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CONVEYANCER'S NOTEBOOK

Extension of Compulsory Registration.—An Order in Council (S.I. 1952, No. 395) under section 120 of the Land Registration Act, 1925, has been made declaring that on and after March 15, 1952, registration of title to land is to be compulsory on sale in the County of Surrey. The effect of the Order is that conveyances on sale of freehold land, leases for not less than 40 years and assignments on sale of leasehold land having not less than 40 years to run, must be registered within two months from the date of the particular instrument.

Stamp Duty on Conveyances.—One of the proposals in the current Finance Bill is to relieve purchasers of smaller properties from the burden of the 2 per cent. stamp duty imposed by the Finance Act, 1947. If section 63 is passed into law as it now stands, the effect will be that from August 1 next stamp duty on conveyances up to £500 will remain at 10s. 0d. per cent. and from £500 to £3,000 will be reduced from £2 per cent. to £1 per cent. Between £3,000 and £3,450 duty will be at the rate of £1½ per cent. The proposals only apply to transfers of land but have a limited application to leases granted in consideration of a premium. The premium will bear duty at the above rates only if the rent does not exceed £20 per annum. The appropriate certificate will have to be incorporated in the conveyance for the purchaser to have the benefit of the concessions. The concessions apply to gifts as well as sales, the value of the land being substituted for the purchase price to arrive at the rate of duty. The relief goes some way towards off-setting the costs of first registration in the case of

smaller property but there will still be a large number of houses changing hands between £3,450 and £4,000 which do not get any benefit.

Registered Land and Land Charges.—We have received a further letter from the Chief Land Registrar who writes as follows:—

"While I don't want to labour the Land Registry point of view, I think your contributor creates a misleading impression by stating that a cautioner is 'merely entitled to notice of proposed dealings with the land.' It is what flows from the notice that is important. It obliges the cautioner to assert his rights or acquiesce in the transaction and abandon his caution. If he adopts the former course he can obtain a judicial hearing before the Chief Land Registrar where the rights of the parties can be determined. In sub-rule (3) of Rule 220 of the Land Registration Rules, 1925, are examples of the kind of orders that may be made at such a hearing. I suggest that this machinery for immediately bringing into the open disputes or difficulties affecting title to land and getting them disposed of finally and expeditiously is an immense improvement over the unregistered system.

"Secondly, your contributor points out that an application for a caution must identify the land affected by the interest being protected. I agree. I do not agree, however, that where the land is not registered a land charge can be registered as to wholly unspecified land. Rule 9 (1) of the Land Charges Rules, 1925, provides that 'Applications for registration . . . shall be made on, and shall furnish the particulars set forth in, the several forms for those purposes given in the Schedule hereto, or on such other forms as the Registrar shall from time to time determine.' The prescribed form for registration of a land charge is Form L.C.4. This requires the county and the parish, place or district where the land is situate to be stated and where practicable, a short description sufficient to identify the land affected to be provided. The land charge registered in the *Turley* v. *Mackay* case specified the counties and parishes where the land was situate, and in addition described a number of properties by road numbers."

We think the first point under discussion is of considerable practical importance and are sure that readers will agree that the Chief Land Registrar has no reason to feel diffident about pursuing the matter. We still adhere to our view that the registration of a caution is not nearly as satisfactory as the registration of a land charge under the Land Charges Act, 1925. The registration of the latter is simpler and cheaper and, from the point of view of the

person registering, completely effective. The registration of a caution has a result entirely different from registration of a land charge under the Land Charges Act. The latter gives notice to the whole world of the claim of the person registering, whereas the former is in effect merely a licence to enter upon an argument. Why should the person registering have to go to the trouble and expense of putting forward his contentions? Why should he not be able to give effective notice to a purchaser so as to bind the purchaser? The purchaser could then decide whether the charge registered binds him or not. Furthermore, if the letter from the Registry notifying the cautioner of the proposed dealing were to go astray, the cautioner would be placed in a very unfortunate position. In view of the publication commencing in this issue of an article dealing with the Land Registration Act, 1925, we do not think we will be thought discourteous in not pursuing the matter further here.

With regard to the *Turley* v. *Mackay* type of estate contract, although we agree that, in the case of registration under the Land Charges Act, the general situation of the land must be specified, there is no obligation, as we understand it, to specify the particular plot of land, and if a person entered into a contract affecting all land which he might then own or subsequently acquire in, say, a county borough, it would be registrable in the case of unregistered land, but we fail to see how it could be registered with regard to property to be thereafter acquired in the case of registered land.

Answers to Preliminary Inquiries.—The case of *Mahon* v. *Ainscough* (noted *post*, p. 129) is a useful reminder of the effect of answers to preliminary inquiries. Attempts have been made from time to time to raise such answers to the status of warranties or terms of the contract. Such attempts have not surprisingly been wholly without success. The answers are representations which do not give rise to an action for damages unless they are both incorrect and fraudulently so. Three points of practice may be noted: first, a vendor's solicitor's answer as to his knowledge should not, in general, be accepted, whether to a preliminary inquiry or to a requisition. The answer should be that of the vendor. Secondly, the note at the end of the form used in that case, that it was still necessary to make inspection of the property, does not appear to serve any useful purpose. Thirdly, the mere repetition of preliminary inquiries as requisitions does not improve the vendor's position; indeed, few preliminary inquiries are properly made the subject of requisitions, for they neither affect title nor rights under the contract.

Purchase from son of "Sitting Tenant."—A correspondent inquires whether an assignment of a weekly tenancy is complete without any giving up of possession. The particular problem concerns a sitting tenant whose son wishes to buy the freehold reversion, entering into a mortgage to enable him to raise the necessary purchase money. If the father, the existing tenant, executes a formal assignment under seal of his tenancy to his son, the assignment is effective without any further step. It is immaterial whether or not the assignor remains in occupation of the premises. As a result the landlord may sell to the son as "sitting tenant" and the mortgagee may safely advance. Inevitably the father loses his security of tenure and must trust his son. Not only may the mortgagee sell the property with vacant possession under his statutory power of sale, but there seems no way of preventing the son selling the property himself. The continued possession by the father would amount to a licence, but this should cause no difficulty since he has assigned his tenancy in order to enable the son to raise the mortgage and it could be no term of that licence that he could prevent the mortgagee realising his security.

In *Bannister* v. *Bannister* [1948] 2 All E.R. 133 the understanding was that the vendor would be allowed to remain on the premises undisturbed, and there was an oral undertaking by the purchaser to that effect. In *Errington* v. *Errington* [1952] 1 All E.R. 149, the licensees were intended to be secure so long as they paid instalments on a mortgage. Both cases are, therefore, distinguishable. It must also be remembered that the persons claiming possession were, in the first case, the original contractor, and, in the second place, the voluntary devisee of a house under the will of the contractor. So far as *dicta* in the latter case would treat a purchaser, including a legal mortgagee, as bound by a mere licence, whether or not under seal or for value, or would treat such a purchaser as affected by notice, they appear, with respect, to go too far.

The advantage of a prior deed of assignment of the tenancy, followed by a straightforward conveyance, would be to keep the history of the lease and any possible licence off the purchaser's title. A surrender by the father to the landlord, conditional on a conveyance to the son, would offer no advantage over an assignment of the tenancy. The surrender of possession by the father would only be material in the absence of an express surrender, but the law of surrender by operation of law is too complicated to discuss here.

A. K. R. K.

THE LAND REGISTRATION ACT, 1925 AFTER TWENTY-FIVE YEARS

By G. Boughen Graham, ll.b., Barrister-at-Law

When the Law of Property Act, 1922, and the Property Acts of 1925 were before Parliament it appeared from the speeches of those Ministers responsible for the reforms that it was the intention of their sponsors that the two rival systems of registered and unregistered conveyancing should continue side by side for a period of at least 10 years, after which sufficient experience would have been gained to enable their respective merits to be inquired into with a view to eventually superseding one by the other. There seems to be no doubt that the protagonists of registration were certain that time would show their system to be superior whilst, on the other hand, the adherents of the older system were confident that the simplification introduced by the 1925 legislation would ensure that unregistered conveyancing would have no difficulty in competing with the newer methods. Unfortunately the public inquiry into the respective merits of the two systems has never been held.

When compulsory registration was extended to Eastbourne in 1926, to Hastings in 1929, to Middlesex in 1937 and to Croydon in 1939, there was no request for any inquiry under section 122 (*a*). An extension to Surrey was proposed in 1938 but, as a result of the war, this proposal was withdrawn until 1951, when an inquiry under that section was held by Mr. Neville Gray, d.s.o., q.c., and when all three Surrey Law Societies opposed the proposal (*b*).

The Land Transfer Committee of 1943 (the Rushcliffe Committee) stated in para. 3 of their report (Cmd. 6467):—

> "Our terms of reference do not invite us to express our view as to the respective merits of transfer of land by registration in a land registry or by conveyance. As a matter of courtesy and convenience we listened to expressions on this subject both for and against each of the respective systems from witnesses who desired to tender it. None of this evidence, however, led us to take the view that there were any material defects in the system of transfer by registration."

(*a*) References to sections or the rules are to the Land Registration Act, 1925, or to the Land Registration Rules respectively.

(*b*) The principal witness called for the Mid-Surrey Law Society was Mr. A. F. Stapleton Cotton, of Epsom, and the writer desires to express his thanks to Mr. Cotton for having made available a large number of documents relating to the inquiry.

One is bound to say that this opinion is rather reminiscent of the first report of the Real Property Commissioners which was issued in 1829 when it was said (at p. 6):—

> "We have the satisfaction to report that the Law of Real Property seems to require very few essential alterations and those which we shall feel it our duty to suggest are chiefly nodal. When the object of transactions respecting land is accomplished . . . the law, except in a few comparatively important particulars, appears to come as near to perfection as can be expected in any human institutions."

Mr. Neville Gray took a much less complaisant view of the present system than did the Rushcliffe Committee, for he said in his report (para. 17):—

> "It was established by the evidence that under the existing law and practice there are still certain matters in relation to which registration of land is not entirely satisfactory and in relation to which the position of an unregistered owner is more satisfactory."

Mr. Gray did not think it right to go into the question in detail because he was satisfied that the shortcomings of the registered system were not sufficient grounds for delaying the extension of compulsory registration to Surrey, but it will be observed from para. 18 of his report that he envisaged some reform either by administrative action or by legislation. In fact counsel for the Crown and the Chief Land Registrar, after hearing the evidence of the objectors, accepted the need for some body in the nature of a "Consumers' Committee" whereby the shortcomings of the registered system could be brought to the notice of the Registrar with a view to some amendment if not of the law at least of the practice. The Chief Land Registrar was confident that he had the power to co-operate in setting up an informal body of that nature and expressed his intention of communicating with the Law Society in that sense.

It is proposed in this article, first, to examine some of the claims put forward on behalf of the registered system as they appear in 1952 after some 25 years' experience of "The New Conveyancing" and in the light of the latest developments in the law generally; secondly, to draw attention to a number of specific disadvantages or shortcomings of that system. The first, it is submitted, is not merely a rewriting of the arguments of 30 years ago, because it will be recalled that the 1925 legislation operated upon both systems, and it is generally admitted, even by the professed advocates of registration, that the relative advantages of registration (assuming

them to exist) are less now than they were before 1925. The second, it is hoped, will not only draw attention to the points which the projected "Consumers' Committee" will have to consider but will serve to warn those members of the profession, who have hitherto had the good fortune to avoid much contact with registered land, that there are many pitfalls to be avoided.

The three great advantages which are claimed for the registered system are simplicity, cheapness and the State-guaranteed title, and they may be considered in that order.

Simplicity

It is not disputed that in some cases a registered title is simpler than an unregistered one: unfortunately, however, it is sometimes suggested that a registered title is always simpler, indeed one is asked to believe that it is necessarily simpler. Of course, if registration were entirely voluntary it no doubt would be the case that registered titles would be simpler because those titles which were suitable for registration would be registered and those which were not would not. The avowed object of those who support registration appears to be, however, compulsory registration throughout the length and breadth of the land and the merits of the system must be tested on that basis. It is proposed to examine, first, certain common leasehold transactions, and secondly, a straightforward sale of the fee simple to see to what extent the registered system is simpler.

Leaseholds

(a) A grants a lease of 50 years to B.

If there is no question of registration the lease and counterpart are engrossed and exchanged.

If the land is registered the lease is engrossed as before and in addition B will have to have a certified copy made of it and must lodge it with the original lease for registration. If B is a company there will have to be lodged in addition a certified copy of its memorandum and articles of association and its certificate of incorporation. If it has created any debentures constituting a floating charge over its assets a certified copy of the debentures and of any trust deed securing them must also be lodged.

So far the advantages of simplicity appear to lie with the older system.

(b) B assigns the lease to C.

If there is no registration the only title deed will be the lease (Law of Property Act, 1925, s. 44 (2)) and all that C will require

will be the lease and an assignment. That assignment need not be any longer than a transfer of a registered lease.

If the lease is registered there will be two title deeds—the lease and the land certificate—instead of one. A copy of the entries in the register will have to be supplied to C, in addition to the lease, and the transferee will have to obtain the land certificate and forward it with the transfer for registration.

Again the advantage of simplicity lies with the unregistered system.

(c) C surrenders the lease to A.

If unregistered C hands over the keys and the lease in exchange for the counterpart.

If registered it will be necessary to provide some proof of the surrender (usually a deed of surrender) which may be lodged at the registry, so that the leasehold title may be cancelled. Very often, particularly during the war, a tenant would serve notice of disclaimer. In the case of unregistered land the effect would be that the landlord might forthwith either grant a new lease or sell with vacant possession and the tenant was freed from liability under the lease. In the case of registered land it often happened that the parties did not realise that a " simpler " system involved taking more steps than were necessary without it and the tenant omitted to have his registered title cancelled. That omission was frequently not discovered until the landlord wanted to deal with his fee simple and by then it was difficult, if not impossible, to trace the tenant.

It is thought that it cannot be denied that the " simplicity " claim fails where leases are concerned. Let us see how far it succeeds on a sale of the freehold.

Sale of Freeholds

It is undeniable that since 1925 two changes have taken place in conveyancing practice. First, the reforms of that year have immeasurably simplified title and so shortened both abstracts and conveyances. At the recent inquiry before Mr. Gray every witness was asked what he would suggest to be the average length of a modern abstract: the Chief Land Registrar suggested seven pages; Mr. J. J. Wontner, who volunteered evidence in favour of extension, suggested three or four. As time goes on, and a 30 years' title can be made without going back earlier than 1925, the average length and complexity of an abstract must decrease accordingly. The second great change, probably far more important in practice than the first, is the enormous increase in the number of matters

which do not concern title as such but which do closely concern a purchaser of land.

There can be no doubt that today the most difficult and worrying part of the duty of a solicitor acting for a purchaser is concerned with those inquiries which must be made by a prudent purchaser prior to contract. These inquiries are concerned with a multitude of matters; examples are Income Tax, the Rent Restrictions Acts, Town and Country Planning matters, and all the manifold entries which are to be found in the Local Land Charges Registries. The importance and complexity of these latter will be appreciated on a perusal of the recent report of the committee upon that subject (Cmd. 8440) and it will not be forgotten that in that report it was recommended that the present common habit of making supplementary inquiries should continue. (See paras. 12–17.) No practising solicitor will need to be reminded of the difficulties arising out of these matters which have nothing whatever to do with title strictly so called. Those without personal experience may gain some idea of their extent from a printed form devised by a firm of solicitors for their own benefit and which is before the writer. It is headed "Inquiries arising on the Draft Contract" and extends to some 80 questions and sub-questions.

There is no decision in which it is laid down that it is the duty of the solicitor acting for the purchaser to make these inquiries, but there can be no doubt that at the present time he would be a very imprudent practitioner who omitted them. In practice they are invariably made and it is only in rare cases that any additional charge is made for them, although it is certainly arguable that the scale fee does not, strictly speaking, cover them. However that may be, there is certainly authority that if, when an inquiry is in fact made, the answer received is inimical to the interests of the purchaser, then the solicitor is under a legal duty to communicate the information received to his client: *Lake* v. *Busby* [1949] 2 All E.R. 964.

The relevance of all this to the present inquiry is that all this work must be done whether the land is registered or not. Hence, even if it could be shown that the registered system was so much simpler that it reduced the work necessary to show and convey a good title by as much as two-thirds, yet it would by no means follow that it reduced the work to be done upon a sale by that amount or anything approaching it. It has been said with great truth that the Land Registry only deals with the easy part of conveyancing.

Bearing that in mind, let us now examine how far the registered

system is in fact simpler than the unregistered so far as making title upon a sale of freeholds is concerned.

First, on making title to registered land it is not necessary to peruse an abstract of title or to compare it with the original deeds; on the other hand, it is necessary to peruse an abstract of the land certificate and compare it with the original or, alternatively, to bespeak an office copy (paying the fee therefor) and peruse it. Now there may be some lessening of work here, but it all depends upon the length of the abstract and the complexity or otherwise of the land certificate. As to the first it has already been said, and it is not denied, that abstracts have decreased in length and are continuing to decrease in length. As to the second it will be seen later that if the registered system is to operate as efficiently as the unregistered it is essential that the land certificate should be very much fuller than it is frequently found to be today.

Secondly, it is necessary to prepare requisitions in either case. At one stage in the recent inquiry before Mr. Gray it was suggested for the Crown that requisitions were unnecessary in the case of registered land, but there can be no doubt whatever, so long as there exist overriding interests, restrictive covenants and the like, requisitions will be necessary although they may well be shorter than in the case of unregistered conveyancing.

Thirdly, it is necessary to prepare, in one case, a conveyance, in the other case, a transfer. It is certain that a transfer will never be longer than a conveyance but, on the other hand, it is not at all certain that it will be very much shorter. Sometimes the only discernible difference is that there are no recitals and the words "in fee simple" are omitted. And so far as the recitals are concerned a goodly number of conveyances would be better without them.

Also, as will be seen when the effects of the Town and Country Planning Act, 1947, are discussed, it may be necessary, in the case of registered land, to prepare extra documents to deal with matters which would be incorporated in a conveyance.

Fourthly, when dealing with registered land it is necessary after completion to send the transfer together with the old land certificate and the necessary fees to the Land Registry and, on its return, the new land certificate must be checked over and any discrepancies taken up with the Registry. It may be observed that the Registry requests that this be done, and the Chief Land Registrar, at the recent inquiry, admitted that the work might be considerable. In the case of unregistered land the handing over of the conveyance completes the matter, so that under this head the work involved in the newer system seems more rather than less.

So much for the differences in the work which is to be done. Readers may judge for themselves how much or how little time and effort is saved by the one system compared with the other. When they have done so they will have a measure of the degree of simplicity which registration introduces and they may regard it against the background of a bare list of matters which are to be attended to whether the land is registered or not—taking instructions, perusing draft contract together with any other document which is to be considered therewith, making local searches and inquiries and all the inquiries adverted to above and consulting the purchaser upon the results, fixing an appointment for completion, preparing a completion statement, attending completion, stamping either a transfer or a conveyance and arranging the insurance of the property.

Cheapness

It has been said in the past and it will be said again in the future that the mainspring of any opposition to land registration lies in vested interests, and it may be said at once that there is no intention of putting forward here any plea for increased remuneration for members of the profession. All that is proposed is to examine, very briefly, how far the registered system is cheaper, why it is cheaper, and whether it is certain that it always will be cheaper.

First Registration

When property is first registered the expense to the purchaser is, it is always admitted, greater than if there had been no registration. Thus, in the case of a property sold at £5,000 it is approximately £14 5s. 0d., made up of £9 0s. 0d. Land Registry Fee and £5 5s. 0d. or thereabout to the solicitor who carries through the registration. It is said that this will be more than recouped upon subsequent dealings; costs on subsequent dealing will be considered later, but assuming, for the moment, that they are not only cheaper but are rightly cheaper and will so continue, one observes that the purchaser is out of pocket at the beginning and will remain out of pocket until he sells the land, when he will be reimbursed to the extent that his purchaser will be prepared to pay more for the land because it is registered.

This was always realised by speculative builders and others who were buying land for quick resale in small parcels; many cases of voluntary registration have been of this sort and no one will quarrel where the owner of land decides to register because he

thinks that it will pay him. Where registration is made compulsory, however, a purchaser has to pay the extra upon first registration whether he intends to resell or not, and it may be thought that in these days of housing shortage and high prices it is a little hard that a man who is compelled to pay a higher price than he can properly afford to get a roof over his head should, in addition, have to pay a doubled stamp duty (*c*) plus this extra impost. It is said that he will get it back when he resells, but it may be that he will wait a long time for it and in any case there is no guarantee of it. For the purposes of the recent inquiry an examination was made of a number of building estates developed between 1930 and 1934 and it was found that after 18 years something like 60 per cent. of the houses had not changed hands. Furthermore, there is not the slightest proof that he who pays the charges upon first registration will get them back. Very few people would suggest that estate agents make a "selling point" of the fact that a property is registered and it is suggested that if a house is put on the books at, say, £5,000, that price would be exactly the same whether the title is registered or not.

It is reassuring to observe from Mr. Gray's inquiry that the Chief Land Registrar is prepared to recommend that a reduction be made in the fees payable upon first registration. In fact there is a very good case for abolishing them. It has been said that one must not consider whether the original purchaser will get his money back upon resale, one must look further to all the chain of future owners who will benefit. If that is so, if the benevolent taxpayers decide to benefit posterity in that way, then surely the taxpayers in general should pay for it rather than put the burden upon those who are unfortunate enough to have to buy land in a compulsory area.

Subsequent Transfer

There can be no question that once land is on the Register the costs of transferring it at the present time are less than if it were unregistered. The reason for this is that the remuneration of the solicitors attending to the transaction is cut in half. Hence it is perfectly plain that the saving in cost will always amount to the difference between the costs allowed to solicitors in the case of registered and in the case of unregistered land, less, in every case, the amount of the Land Registry fees. As has been stated above and as is well known the present difference is exactly 50 per cent., and so long as that continues and so long as the Land Registry fees

(*c*) The Finance Bill, 1952, promises some relief in small transactions.

remain about their present level the saving in cost is considerable. It has already been demonstrated, it is thought beyond argument, that the difference in work and in responsibility is nothing approaching that figure and, as fewer and fewer pre-1925 roots of title are found the difference will progressively lessen.

Section 56 of the Solicitors Act, 1932, gives power to a committee to vary the remuneration of solicitors in non-contentious business and it is incontrovertible that if that committee decided that, as a result of the tendencies discussed above, the discrepancy between the work done in either case was less than the discrepancy between the fees allowed in respect of it, so that one scale were increased or the other diminished (and for this purpose it matters not which) the argument as to cheapness would either be very much reduced or would disappear entirely.

The State Guarantee

The third great claim which is made for the registered system is that it ensures a "State-guaranteed title." In considering this claim it seems convenient to examine whether the claim is true and then to consider how great is the advantage over the unregistered system.

The Extent of the Guarantee

The title of a registered proprietor is, in fact, invulnerable to the extent that the Register will never be rectified against a proprietor in possession except to give effect to an overriding interest or:—

> Where he has substantially contributed to a fraud, mistake or omission giving rise to the rectification (section 82 (3) (a)).
>
> Where the disposition to the proprietor was void or where he claims, other than as a purchaser for value, through a void disposition (section 82 (3) (b)).
>
> Where it would be unjust not to rectify against him (section 82 (3) (c)).

The classic example of rectification to give effect to an overriding interest is *Chowood* v. *Lyall* [1930] 2 Ch. 156, where a registered proprietor had, prior to registration, bought land without notice of the acquisition of title to part of it by adverse possession. It was held that since the adverse possession was an overriding interest the Register must be rectified against him and in favour of the squatter. Something more will be said about overriding interests when the subjects of boundaries and easements are discussed, but there is no doubt that, as Sir John Stewart-Wallace said, they are the stumbling-block of the registered system. It hardly seems possible

under any system of registration to avoid them entirely, but the more they are circumscribed the better is the system of registration.

So far as section 83 (3) (a) is concerned there can be no sympathy for one who has substantially contributed to fraud, but the recent case of *Re 139 High Street, Deptford* [1951] Ch. 884 (noted *ante*, Vol. 15, pp. 185, 272) indicates how easy it is to contribute to a mistake. In that case the purchaser put forward for registration a conveyance which had no plan annexed thereto and which conveyed "all that shop and dwelling-house situate at and known as 139 High Street." Adjacent to what may be called 139 High Street proper was a small piece of derelict land, access to which could only be obtained through 139 High Street. To all appearances and in the mistaken view of both vendor and purchaser the small piece of land was part of 139 High Street, and the same view was taken by the officials of the Registry since the plan which was annexed to the land certificate when it was issued showed that piece of land as part of the property. In fact it was not and its true owner applied for the Register to be rectified in his favour. Wynn-Parry J. ordered such rectification saying (at p. 891):—

> ". . . it appears to me that the determining factor is the circumstance that, so far as the physical aspect of the matter is concerned, the disputed land must have appeared to anyone looking at the properties in question to form part of 139 High Street. It was, apparently, so obvious that the vendors to the respondent fell into the mistake, the respondent himself fell into the mistake, and the Land Registry fell into the mistake.
>
> "Accordingly it appears to me . . . to follow, necessarily, that the respondent must be held to have contributed to the mistake within the meaning of section 82 (3) (a)."

At the same time he expressed the view that it could not be said that the conveyance was void within subsection 3 (b) although it was ineffective to convey the piece of land under dispute. Nor did he think that, had there been no mistake under subsection 3 (a), that it would have been right to rectify under subsection 3 (c).

An instance of the operation of section 82 (3) (b) is to be found in *Att.-Gen.* v. *Odell* [1906] 2 Ch. 47, where a solicitor produced a charge purporting to be executed by the registered proprietor; the Register was rectified by expunging the charge when it was proved to have been forged by the solicitor. But suppose A to forge a transfer from the registered proprietor to himself, procure his own registration and then sell to B, who takes in good faith and for value. B, it appears, is protected against rectification. This sequence of events, it seems, actually occurred in the case of J. G. Haigh which was quoted by the Chief Land Registrar in evidence

before the recent inquiry. There is no doubt that in this case the State title is impregnable; under the unregistered system the ultimate purchaser would have been deprived of his land and left with a (probably valueless) action for damages.

Section 82 (3) (c) is rather at large and does not seem to have been the subject of any judicial examination except *obiter* in *Re 139 High Street, Deptford* (*supra*).

In considering the validity of the State Guarantee it is necessary to look at the provisions for indemnity. By section 83 (1) compensation will be paid to any person suffering loss by the rectification of the Register or suffering loss where the Register is not rectified, but this is limited by section 83 (5) in that compensation shall not be paid where the applicant has substantially contributed to the loss by his fraud or on account of mines and minerals unless a note appears including mines and minerals upon the title. The point to observe here is that the applicant must prove a loss consequent upon rectification. In *Att.-Gen.* v. *Odell* (*supra*) it was held that an immediate grantor under a forged transfer had not suffered loss by the cancellation of his registration because the forged transfer had given him nothing so that he had lost nothing. This was provided for by section 83 (4), whereby a proprietor registered in those circumstances is deemed to have suffered a loss.

The Act does not, it seems, provide for the not dissimilar circumstances which arose in *Gibbs* v. *Messer* [1891] A.C. 248, on appeal from Victoria. In that case the registered proprietor was a fictitious person placed on the Register by a forged transfer. A mortgage purporting to be executed by the registered proprietor was registered and it would seem that if the Register was rectified in favour of the true owner of the land it might well be argued that the chargee had had nothing and so lost nothing by the rectification. It is suggested by the learned editors of Brickdale and Stewart-Wallace that if the proprietor of the supposed charge had in the meantime transferred it to another for value, then that other would have a claim in view of section 33 (3).

The most serious gap, as it were, in the compensation provisions is, of course, that demonstrated by *Re Chowood* [1933] Ch. 574. This was a claim for compensation arising out of *Chowood* v. *Lyall* (*supra*) and it was held that since the registration was expressly subject to overriding interests the registered proprietor could not be said to have suffered any loss by rectification to give effect to those interests.

The strength of the " State Guarantee " was perhaps correctly

stated in para. 21 of the Report of the Land Transfer Committee of 1935 (the Tomlin Committee) where it was stated:—

> "We do not consider that the phrase 'State Guaranteed' is proper to be applied to describe the title of the registered proprietor under the present system of compulsory registration on sale without reference being made to the effect of section 70 of the Act in regard to overriding interests and (in the case of mines and minerals) to the effect of section 83 (5) (b)."

In addition the practitioner would do well to keep in the forefront of his mind the lessons to be learned from *Re 139 High Street, Deptford* (*supra*).

The Need for the Guarantee

Having considered the extent of the State Guarantee one must consider how great an advantage its existence is in practice. If a purchaser of unregistered land finds that his title is defective he is by no means without remedy. He will (at any rate upon a sale by a beneficial owner) have an action upon his covenants for title and he may have an action in negligence against his solicitor. Nevertheless it must be freely admitted that in such cases he would be liable to be turned off his land whilst in a number of cases the registered proprietor of land would in similar circumstances be able to retain possession. (See for example the case of Haigh quoted above.) In general it may be said that the registered system shows to the greatest advantage where there has been forgery. On the other hand, it is of no value at all where the default in the title consists of the existence of overriding interests or falsely designated boundaries, and it may be thought that these difficulties arise much more frequently than does forgery.

In fact the number of occasions in unregistered conveyancing when the purchaser does find himself with a faulty title is very small indeed and, since 1925, growing less. At one time, when land was first registered the Registrar regarded himself as being in the position of a prudent purchaser and examined the title accordingly; now it would appear that the Registrar is willing to register with an absolute title in cases which might be described as "risky." Whichever policy has been and is being adopted the Land Registry figures show that bad titles are most infrequently met with. In 1950 over 99 per cent. of the titles offered in the compulsory area were registered with absolute title; in the non-compulsory area the proportion was lower, 93·8 per cent., but this is doubtless accounted for by the fact that it is the bad title which is most frequently offered. Despite this high proportion of titles accepted the total compensation paid since the inception of the system is no more than

£4,500 distributed among 32 claims. One wonders whether it is worth setting up so elaborate a system to guard against so small a possibility of loss.

Having examined in the light of present-day experience the three principal advantages claimed for registration it is next proposed to examine a certain number of practical difficulties which are encountered in the working of the system.

(*To be concluded in our next issue.*)

SERVICE OF NOTICES BY POST

By J. Montgomerie, b.a., Barrister-at-Law

For owners and tenants of property this is an age of notices—notices to quit, notices relating to breaches of covenant, notices of disclaimer or conditional retention, sanitary notices, counter-notices under the Leasehold Property (Repairs) Act, 1938, or the Agricultural Holdings Act, 1948, and numerous notices under other Acts. In other fields of life we are also constantly serving or being served with notices of one sort or another. At least 90 per cent. of these notices are served by post. It is surprising therefore that neither the common law, statute law nor conveyancing practice should be in a satisfactory state regarding service by post. Notices may fail to reach the addressee or reach him late either through faults in the postal service or because the addressee has changed his address or is temporarily absent. It is these contingencies which give rise to difficulties.

There are two points of view to be reconciled regarding the service of notices, the point of view of the sender and the point of view of the addressee. To the sender it is obviously a hardship if the notice is to be held to be out of time because the addressee was away on holiday or on business and did not receive the notice till too late. It may be even greater hardship if the sender cannot serve the notice at all because the addressee has disappeared altogether without trace. To the addressee it may well be a great hardship if he is to be bound by a notice which he never received or only received when it was too late to do anything about it. Which of these two views is to prevail? In the present state of case law and statute law it cannot be said that the law is wholly in favour of either contention or that any clear-cut compromise has been reached.

The common law has fluctuated between these two points of view. In *Jones and Griffiths* v. *Marsh* (1791) 4 T.R. 464, a notice to quit had been delivered to a servant of the tenant on the demised premises. There was no evidence whether it had or had not reached the tenant himself. It was held that the notice was properly served. Buller J. considered that delivery to the servant raised a strong presumption, which had not been rebutted, that it had reached the tenant. Lord Kenyon C.J. was prepared to go further. He said (at p. 465): "But in every case of the service

of a notice, leaving it at the dwelling-house of the party has always been deemed sufficient. So wherever the legislature has enacted that before a party shall be affected by any Act, notice shall be given to him, and leaving that notice at his house is sufficient. . . . In general, the difference is between process to bring the party into contempt and a notice of this kind; the former of which only need be personally served upon him."

On the other hand, in *Doe* d. *Buross* v. *Lucas* (1804) 5 Esp. 153, Lord Ellenborough at Nisi Prius held that the mere leaving of a notice to quit at the tenant's home, without further proof of its being delivered to a servant and explained, or that it came to the tenant's hands, was not sufficient. He followed the reasoning of Buller J.

In *Doe* d. *Neville* v. *Dunbar* (1826) 4 T.R. 464, Abbott L.C.J. went back to the views of Lord Kenyon. The notice had again been served on the servant and no evidence of its subsequent history was given except that the tenant tried, unsuccessfully, to prove that the servant was dead. Abbott L.C.J. said: "I have no doubt that the service of the notice was sufficient. The question does not arise here for the servant might have been called, but I have no doubt as to the absolute sufficiency of the notice; were it held otherwise a landlord could have no means of determining a tenancy if his tenant happened to be absent from the house at the time when it was necessary to serve the notice."

In *Alford* v. *Vickery* (1842) Car. & M. 280, a notice which had been put under the door of the tenant's house was held to have been properly served after evidence had been given that the tenant had received it in time. There was no discussion as to what would have happened if such evidence had not been available.

Papillon v. *Brunton* (1860) 5 H. & N. 518, is a striking case. A notice to quit was posted on the morning of March 25 by a tenant to his landlord's solicitor who collected the rent. In the ordinary course of the post in those happy days it should have been delivered the same morning. In fact when the solicitor went home between 6 and 7 p.m. it had not arrived, but he found it on his mat the next morning. The jury found that it was delivered on the 25th after the solicitor had left and that someone ought to have been on the premises to receive it. The question was whether the letter was served on the 25th or on the 26th, by which date it would have been out of time. In the course of argument Pollock C.B. said (at p. 519): "If a notice to quit was left at the dwelling-house of a landlord and he was abroad, that would be sufficient to determine the tenancy." And he cited as a parallel the position regarding notices of dishonour of a bill of exchange.

but in his judgment he refused to deal with this proposition and the court decided the case on the narrower ground that the finding of the jury meant that the letter had been served during usual business hours. As the parties had made the solicitor a means of communication, service on him during business hours was good service.

Apart from the intriguing question of what were the usual business hours of a solicitor in those days, the difficulty lies in fitting in this case with the other decisions. If service at the home of the addressee when no one happens to be there is not good service, it is not clear why service at his business premises or those of his agent should be sufficient if no one is there. Nor can there be any duty on the solicitor's part towards the sender of the notice. It would appear that this case can only fit into the scheme of things if the real principle is that the sender has fulfilled his duty if the notice is delivered to the address of the addressee or his agent where he can reasonably expect it to reach him. This case must be considered therefore as being strongly in favour of the sender's point of view.

The next case in point of time to be considered is *Gresham House Estate Co.* v. *Rossa Grande Gold Mining Co.* [1870] W.N. 119, where it was held that proof of posting of the notice raises a presumption that it reached its destination at the proper time according to the regular course of business of the Post Office and was received by the person to whom it was addressed. But it was not considered how far and by what evidence this presumption could be displaced.

In *Tanham* v. *Nicholson* (1872) L.R. 5 H.L. 561, the House of Lords considered most of the earlier authorities but unfortunately the grounds of the decision are not very clear cut. A notice to quit was delivered on the demised premises to the daughter of an imbecile tenant. There was some evidence which the majority of the court apparently accepted, though with some hesitation, that the daughter destroyed the notice without its ever being brought to the notice of the tenant. It was held that notice was properly served. Lord Hatherley's view was that the sole question was whether the daughter was agent of the tenant to receive the notice and as she managed the house for her father she was clearly his agent and servant. A domestic servant would have been in the same position. Neither he nor Lord Colonsay therefore considered the wider question whether simply leaving the notice at the premises would have been sufficient. Lord Westbury, however, did deal with this point in considerable detail. He says (at p. 573): "I regret very much to find that the law is in the state in which

it is with regard to the service of notices to quit between landlord and tenant. . . . If the landlord has once done that which the law throws upon him the obligation to do, his rights consequent upon having performed that legal duty ought not to be affected in any manner whatever by that which is done by his antagonist upon whom the notice has been served. It would be an idle thing to say that a landlord, serving a notice in due manner according to law, is to be deprived of the benefit of what he has done by the wilful act of a servant of the tenant, or by the incapacity of the servant or by any accident that may befall the notice after it has been received in the dwelling-house of the tenant on whom it was served. And there is no trace of anything of that kind in the earlier cases that have been referred to." He then cites with approval the passages from the judgments of Lord Kenyon and Lord Chief Justice Abbott already quoted, criticises Buller J., and repeats Lord Kenyon's distinction between notices which might lead to criminal responsibility and notices affecting property.

The last case on this subject which requires mention is *Hogg* v. *Brooks* (1885) 15 Q.B.D. 256. The landlords were given by the express terms of a lease the right to determine it at the end of fourteen years " by delivering to the tenant . . . six calendar months' notice in writing." The tenant had disappeared leaving a mortgagee in possession. The landlord sent a letter by post directed to the tenant at his last known address, but the letter was returned without having ever reached him. The Court of Appeal in a short judgment held that the lease had not been determined because on the ordinary meaning of the words in the lease the notice had not been delivered to the tenant. The cases discussed above were not referred to and the matter was treated as one of pure construction of the clause in question which required actual delivery to the tenant.

It will be seen therefore that the common law is still in what Lord Westbury called " a state of some embarrassment." The following propositions seem to be generally accepted by the text-books as the result of the cases:—

(a) if the notice reaches the addressee in time, it is good service whatever the method adopted;

(b) if the notice is received by a servant or agent, who is an agent to receive the notice (but not necessarily to deal with it), that is sufficient even if it never reaches the addressee;

(c) if service on a solicitor or estate agent is contemplated, service at his business address during usual business hours is sufficient even if no one is on the premises;

(d) but merely leaving the notice at the home of the addressee, whether by the hand of a postman or not, is insufficient unless there is someone to receive it as agent or servant of the addressee.

But this fourth proposition rests solely upon Lord Ellenborough at Nisi Prius in *Doe* d. *Buross* v. *Lucas* (1805) 5 Esp. 153, and that case is difficult to reconcile with the views of Lord Kenyon, Lord Chief Justice Abbott and Lord Westbury and with the decision in *Papillon* v. *Brunton* (1860) 5 H. & N. 518, as well as the remarks of Pollock C.B. in the argument in that case.

On the merits it seems very unreasonable that a notice relating to property should be held to be served out of time merely because the addressee has gone away, perhaps for a short holiday, without notifying his change of address or leaving anyone upon the premises. Nor is it logical that a notice should be valid if the addressee has left a maidservant on the premises who does not even open the letter but merely moves it from the door mat to the hall stand, but invalid if it remains on the mat because there is no servant. It is perhaps not surprising that such inconvenient propositions should be found on close examination of the cases not to be by any means so well established as is generally supposed.

The cases so far considered deal with the position where a notice reaches the house or business address of the addressee but he is not there to receive it. Different considerations arise if a notice is lost in the post and never arrives at its destination. There is remarkably little direct authority on this point so far as concerns notices relating to property. The illogicality of the common law was brought out in a powerful dissenting judgment of Bramwell L.J. in *Household Fire Insurance Co.* v. *Grant* (1897) 4 Ex.D. 216, in which he challenged the now firmly established proposition that acceptance of an offer by post is complete at the moment of posting even if the letter never arrives. "It is impossible," he says (at p. 234), "to hold if I offer my landlord to sell him some hay and he writes accepting my offer and in the same letter gives me notice to quit, and posts his letter which, however, does not reach me, that he has communicated to me his acceptance of my offer but not his notice to quit." And he goes on to point out that if a communication sent by hand does not bind the addressee if it never reaches him, there is no more reason why a letter sent by post should bind him. Although the view of Bramwell L.J. did not prevail in relation to acceptances of offers by post, it is probable that the general principle is that a notice or letter cannot bind a person if it is lost in the post unless there is an express or implied agreement that posting the document is to be sufficient service: see *per* Lord

Blackburn in *Brogden* v. *Metropolitan Ry.* (1877) 2 App.Cas. 666, 691. Such an agreement is only inferred in particular circumstances such as notices of dishonour of a bill of exchange or acceptance of offers where the post is a normal and recognised means of acceptance. There is no such implied agreement in relation to a notice to quit (*cf. Henthorne* v. *Fraser* [1892] 2 Ch. 27 at pp. 36, 37).

It is submitted therefore that the common law position regarding service by post is as follows:—

(a) A notice which is posted but never reaches its destination is not to be regarded as properly served unless there are special circumstances from which it is to be implied that the parties so intended;

(b) there is considerable authority for the proposition that a letter which reaches the home or business premises of the addressee is properly served even if he is absent or does not actually receive it except in the case of notices entailing penal consequences;

(c) whether this proposition could be extended to letters addressed to the last-known address of a person who has disappeared is more doubtful.

In view of the doubtful position of the common law it is natural that many statutes which provide for the service of notices should also make provision for the manner of service. The object of such provisions is normally not to prescribe formalities for service with which the sender is bound to comply, but to make good service something which the common law would or might regard as insufficient (see *Shapley* v. *Menby* [1942] 1 K.B. 217). Thus if an Act provides that a notice may be served by registered post, service will nevertheless be good if effected by ordinary post provided that it is received by the addressee in time (*ibid.*). Generally speaking, the statutes before the Interpretation Act, 1889, either by clear express language or on the interpretation put upon them by the courts, if they allowed service by post at all, provided that a letter directed to the last-known address of the addressee was deemed to be duly served at the time when it would be delivered in the ordinary course of post. Examples of cases where the courts had clear words to construe are *Kemp* v. *Wanklyn* [1894] 1 Q.B. 583 (objections to electoral register), and *R.* v. *Westminster Unions Assessment Committee* [1917] 1 K.B. 832 (notice of rateable value). Cases where the Act merely provided for service by post and the courts reached the same conclusion are *R.* v. *Slawstone* (*Inhabitants*) (1852) 18 Q.B. 388 (notice of poor law removal), and *Browne* v. *Black* [1912] 1 K.B. 316 (solicitor's bill of costs). Many other statutes contained similar provisions, *e.g.*, the Public Health

Act, 1875, s. 267, or the Agricultural Holdings Act, 1883, s. 28. Company legislation has made it possible for a company to give notices to a member by posting them to his registered address (see now Companies Act, 1948, s. 134, Sched. I, Table A, art. 131).

Apart therefore from the Interpretation Act, 1889, there is a general rule that, where a statute provides for service by post, in the absence of words to the contrary the addressee must bear the risk of the letter being delayed or lost in the post or failing to reach him owing to his absence. Section 26 of that Act, however, enacts that "Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or the expression 'give' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and *unless the contrary is proved* to have been effected at the time at which the letter would be delivered in the ordinary course of post."

It is strange that these words "unless the contrary is proved" do not appear to have received consideration in any reported case. Do they where the statute applies, adopt the addressee's point of view and enable him to prove that the letter did not reach him either because of some accident of the post or because he was absent at the time? The section is very difficult to construe. If one reads it as far as "containing the document" it seems to be intended that service should be established conclusively by proof of posting even if the letter never arrives. Then it goes on to say that the moment at which service is deemed to be effected is the time at which the letter would be delivered in the ordinary course of post but then it adds "unless the contrary is proved." These words appear therefore to relate only to the time of service and not to contradict the first part of the section. Even so they come near to making nonsense of the section as a whole. For at what time on this footing is service deemed to be effected if the letter never arrives at all? In this case there seems to be an insoluble conflict between the two parts of the section. Nor is it clear what the addressee is allowed to prove to establish "the contrary." Is he only allowed to show that the letter was delivered by the postman at a time other than the normal time of delivery or is he able to go further and show that though delivered in the normal course of post he was not there to receive it? (This last interpretation would make nonsense of provisions for service by post addressed to the last-known address.) Or do the words "unless the contrary is proved" merely allow the sender to prove that the addressee did in fact

get the letter earlier. Until these words are authoritatively construed, a great deal of doubt must remain.

The point arose recently in a case in Stafford County Court. As has been mentioned, the Agricultural Holdings Act, 1883, s. 28, made it clear that a notice properly posted was deemed to be duly served at the time when it would be delivered in the ordinary course of post. But subsequent codifications have relied on the Interpretation Act and have not contained the same phraseology. Service of notices relating to agricultural holdings is now governed by section 92 of the Agricultural Holdings Act, 1948. Three methods of service are provided: (a) delivery, (b) leaving the notice at the proper address of the person to be served and (c) sending it by post in a registered letter. Subsection (4) makes it clear that the Interpretation Act applies and provides that the proper address is the last-known address of the addressee. In the case in question, the landlord served a notice to quit upon the tenant and the tenant served a oounter-notice under section 24 of the Act, by posting it on the day before the last day for service in a registered letter addressed to the landlord's agent some seven miles away. The postman brought the letter to the door during business hours of the agent on the next day (the last day for service) but the agent was at the market and his office was locked up. Had the letter been sent through the ordinary post it would have been put in the letter box and would have been " left " at the agent's address. But as it was a registered letter, the postman took it away again and did not bring it back until the following day. The learned county court judge felt that the words " unless the contrary is proved " in the Interpretation Act, 1889, constrained him to hold that the notice was served out of time. The tenant appealed but died before the hearing and the appeal was discontinued so that the law remains without an authoritative ruling.

It is submitted with respect that the decision was wrong and that the words " unless the contrary is proved " must be given a constricted meaning both in order to prevent contradiction in the section itself and to avoid an interpretation so much out of keeping with what had been the practice in statutes passed before the Interpretation Act. Service, it is submitted, was complete when the postman first arrived at the door whether because that was the ordinary course of the post or because it was the actual time of delivery. But another occasion must be awaited for this problem to be resolved.

Section 26 of the Interpretation Act, 1889, has been referred to in two recent cases but in neither of them did the words " unless

the contrary is proved " come into question. In *Stewart* v. *Chapman* [1951] 2 All E.R. 614, it was held that a notice of intended prosecution under section 21 of the Road Traffic Act, 1930, must be posted within such a time that, in the ordinary course of post it would reach the person to whom it was addressed within the statutory 14 days, excluding the date of the offence. In *T. O. Supplies (London), Ltd.* v. *Jerry Creighton, Ltd.* [1951] 2 All E.R. 992, it was held that postal service of a document on a company under the Companies Act, 1948, s. 437 (1), could be effected by either ordinary or registered letter. The argument that " ordinary course of post " in the Interpretation Act could only refer to the ordinary post as opposed to registered post was rejected. The letter in question had been redirected by a firm of accountants at the company's registered office and when it reached the city office of the company those offices were closed for staff holidays, and the saleswoman left in charge refused to accept the letter. No question was raised on these facts as to when service was complete but it would seem clear that the accountants at the registered office were agents to receive the letter.

Before leaving statutory notices, two sections require consideration as being of particular importance in the sphere of real property. Section 23 of the Landlord and Tenant Act, 1927, appears to be reasonably straightforward. There is nothing in it however to exclude the application of the Interpretation Act, 1889, and the difficulties of that Act already indicated are therefore incorporated in the section. But section 196 of the Law of Property Act, 1925, when closely examined is really rather an extraordinary section. Subsection (1) requires notices to be in writing. Subsection (2) applies only to notices required or authorised by the Act to be served on a lessee or mortgagor and provides that the notice is sufficient although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn or unascertained. This seems to confuse two ideas, the form of the notice and the question of service on an absent person. Subsection (3) authorises service by leaving a notice at the last-known place of abode or business in the United Kingdom of the person to be served, or in the case of a lessee or mortgagor by affixing it to the land. Subsection (4) is the one which deals with service by post. It authorises service by registered letter addressed by name to the person to be served at his last-known address in the United Kingdom. But it is only deemed to be served if the letter is not returned through the post office undelivered. Thus, there is good

service if the letter is lost or destroyed in the post and never reaches the addressee's abode, and good service apparently under subsection (3) if the letter is sent by ordinary post and pushed through the letter-box. But it is not good service if the letter is sent by registered post and the post office is unable to deliver it. If the fault is the fault of the post office, service is effective, but if it is the fault of the person to be served, service is invalid. Service by registered post is thus clearly not without considerable danger. (In the case of breach of repairing covenants, section 18 (2) of the Landlord and Tenant Act, 1927, must also be borne in mind.)

The provisions of section 196 of the Law of Property Act, 1925, are applied by subsection (5) "to any notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears." Just how far this subsection extends is not clear. Does it, for instance, apply to a notice to quit served to determine a monthly tenancy under a written agreement where there is no express mention of a notice to quit; or to a tenancy for say three months certain and then from month to month until determined by a month's notice? In either case is the notice required to be served by the agreement and is there any significance in the fact the earlier subsections use the phrase "required or authorised" while subsection (5) merely says "required"? These are questions to which no answer has yet been offered but they do illustrate the extraordinary vagueness of the section as a whole.

The writer inclines to the view that the section applies to a notice to quit expressly mentioned in the document but not where the document merely creates a periodic tenancy, although in a sense a notice to quit is required to terminate such a tenancy.

Finally, it was suggested at the commencement of this article that conveyancing practice as well as statute law and the common law was inadequate to meet the situation. Clauses dealing with service of notices are framed to provide for the exceptional case where something goes wrong and in view of the confused state of the law they required careful drafting from the point of view of both parties to a lease. Excellent forms are provided by the precedent books but in the writer's experience their use is not as regular as it should be. A very frequent form is something like "Section 196 of the Law of Property Act, 1925, shall apply to notices required to be served by this Lease." This clause is often put in automatically in leases which do not require any notices to be served. In any case it adds nothing to subsection (5) of the Act. It is quite usual to have no such clause at all in periodic tenancy agreements so that, as already explained, it remains

doubtful whether a notice to quit is governed by section 196 or not. Further, the usual method of service is registered post which is the method most liable, where section 196 applies, to lead to trouble.

If this article has concentrated on the difficulties of the legal position and has suggested that the law requires a systematic overhaul on this topic, yet there is this consolation that the occasions when service goes astray do not seem to be of any serious frequency. Presumably it is precisely because the postal service is so efficient that the cases in the reports are so few and far between, and no satisfactory body of case law has been created. But until the law is further clarified by the courts, or by Parliament (as recommended in the Report of the Ridley Committee, 1945, Cmd. 6621, paras. 124–7), conveyancers would do well to regard clauses dealing with service of notices, not as formalities, but as matters of importance requiring careful consideration from the point of view of both the sender of the notice and the person to be served.

ADDITIONAL INQUIRIES BEFORE CONTRACT

By J. F. Garner, ll.m., Solicitor

In the issue of this Journal for September, 1947 (*a*), an article was published on the subject of "Statutory Charges," in which some attempt was made to suggest the action that should be taken by a careful purchaser of land in order to acquaint himself of any charges—an expression here understood in the widest sense—there may be on the land which he proposes to purchase, and which subsist in favour of some local authority or other public body under statutory powers. It is the intention of the present article to discuss what inquiries should be made at the present day, and what sources of information are open to a purchaser's advisers.

It is appreciated that in many cases it will not be possible to take this action before contract, especially in connection with most purchases by auction, but the advice to do so whenever possible is now so well understood that it need not be discussed in the present context (*b*). It is assumed that all the normal searches will be carried out; this article is confined to a discussion of what further action may be necessary (*c*).

(A) Supplementary Inquiries of the Local Authority

The standard forms of inquiries addressed to the appropriate local authorities (*d*) should invariably be used, but these forms do not, it is submitted, go far enough in all cases. Several additional matters that could conveniently be covered by additions to the standard inquiries were recommended in the recent Report of the Lord Chancellor's Departmental Committee on Local Land Charges (*e*), and it is now proposed to deal with these, and a few other matters, in detail. It should, however, be understood that not all the questions suggested need be asked in every case, as in some cases particular questions would obviously be irrelevant. In

(*a*) Vol. 12 (n.s.), at p. 45.
(*b*) See, *e.g.*, p. 46 of the article above cited.
(*c*) It is also assumed that the customary preliminary inquiries are made of the vendor.
(*d*) As agreed between the Law Society and the local authorities' associations.
(*e*) Under the chairmanship of Sir John Stainton, Q.C. The Report has been published as Command Paper 8440, and is hereafter referred to as "the Report," and the Committee is referred to as "the Committee."

the case of land situated within a county borough, all the questions would be properly addressed to the borough council, but in the case of land situated elsewhere, some questions should be addressed to the county council, and some to the appropriate county district council.

(1) *Questions to be Addressed to County and County Borough Councils*

(i) "Has any proposal for any alteration or modification of the development plan been submitted to the Minister, which would affect the property?" (*f*).

Once a development plan has become operative under the provisions of Part II of the Town and Country Planning Act, 1947, it will be open to public inspection (*g*), but the Act provides for no procedure whereby a landowner is necessarily advised of any proposal to alter or modify the provisions of the plan which might affect his property—in particular, such a proposal might alter or add to an area designated in the plan as being subject to compulsory acquisition.

(ii) "Has any notice requiring application to be made for express consent for the continuance of the display of an advertisement on the property, been served under regulation 8 of the Town and Country Planning (Control of Advertisements) Regulations, 1948 (as amended)?" (*h*).

Such a notice is certainly not registrable as a local land charge, but the fact of its having been served may well be of consequence to a purchaser of commercial premises, and in such cases, this inquiry should be made.

(iii) "Are the Council aware of any road proposals, either of their own or of the Minister of Transport, which are not yet included in the development plan, but which may affect the property?" (*i*).

(*f*) See Report, para. 21 (1), and Appendix thereto, para. 7.

(*g*) See below, para. B (iii).

(*h*) See Report, Appendix, para. 8 (2). Where the detailed administration of Part III of the 1947 Act has been delegated by the (county) planning authority to the county district council concerned, inquiry on this point will have to be addressed to the latter council.

(*i*) See Report, Appendix, paras. 13 and 14. It is, of course, possible for road proposals to be formulated by a non-county borough or urban district. The probability of such proposals not being shown in the development plan, forming part of an intended compulsory acquisition, or the site being designated and registered as a "prospectively maintainable highway" under the Public Utilities Street Works Act, 1950, is, however, so slight that it is not considered necessary to advise asking this question of those councils.

Road proposals may not always be included in the current development plan if they are of recent origin, but a road widening or the construction of a new road may in some cases be intended to be carried out before any alteration is made to the development plan. In other cases road proposals, especially for the construction of a " special road " under the Special Roads Act, 1949, may not be shown in sufficient detail in the development plan to make it clear which properties may be affected.

(2) *Questions to be Addressed to County Borough and County District Councils*

(iv) " Have the National Parks Commission made an order under section 87 of the National Parks and Access to the Countryside Act, 1949, which would include the property in an area designated as being of outstanding natural beauty? " (*j*).

The effect of an order made under this section is somewhat similar to that of an order designating an area as a National Park, but it will apply to a much smaller area. A purchaser will be concerned to ascertain whether the property comes within such an area, as (to use the words of the Committee (*k*)) the order appears to subject the land " to a considerably greater risk of refusal of permission for development." A copy of any order made under section 87 must be available for public inspection at the offices of each local authority whose area includes any part of the area to which the order relates, and if any order is disclosed in response to this inquiry, it is suggested that it should be inspected (*l*).

(v) " Is the property included in any supplementary list of buildings of architectural or historical interest issued by the Minister of Housing and Local Government or his predecessors in title? " (*m*).

When the Minister prepared the statutory lists of buildings which are required to be registered in the local land charges registers under section 30 of the Town and Country Planning Act, 1947, he also caused to be prepared, in many cases, " supplementary lists," showing buildings which ought to be preserved, but which were not considered of sufficient importance to be included in the

(*j*) See Report, para. 30.
(*k*) Report, para. 24, and see also para. 30.
(*l*) Fee 1s.: Local Government Act, 1933, s. 280.
(*m*) Report, Appendix, para. 10. It is suggested that the final words to this question are necessary, as the list may have been originally compiled by, or approved by, the Minister of Town and Country Planning, or the Minister of Local Government and Planning.

statutory list. The Committee suggest that there will be a greater risk of obtaining planning permission for the alteration or extension of such a building and that, therefore, the information should be made readily available to a purchaser by a supplementary inquiry.

(vi) "Are there any public sewers in or under the property or any part thereof?" (*n*).

The existence of a sewer under land contracted to be sold on an open contract, and which is not disclosed to the purchaser by the vendor, may in certain cases amount to a latent defect in respect of which the purchaser would be entitled to rescind: see, *e.g.*, *Pemsel and Wilson* v. *Tucker* [1907] 2 Ch. 191. The question need, however, only be asked when the proposed purchaser is contemplating building on the property, as he might then be affected by section 25 of the Public Health Act, 1936, which requires the local authority to reject building plans which show that a building is to be erected over a public sewer, unless they are satisfied that the prohibition can be dispensed with in the particular case. This inquiry will obviate the need to inspect the statutory sewer map required to be maintained by the local authority at their offices under section 32 of the Public Health Act, 1936.

(vii) "Have any directions or conditions as to the discharge of trade effluents been imposed under the Public Health (Drainage of Trade Premises) Act, 1937?" (*o*).

Obviously it will only be necessary to make this inquiry in respect of certain types of industrial premises, but it will be of the utmost importance in an appropriate case.

(viii) "Has any entry affecting the property been made in the registers maintained by the Council under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949?" (*p*).

The Committee suggest that this should be included as a standard supplementary inquiry in respect of all dwelling-houses, to obviate the need to make a personal search in these registers "in the numerous cases where no entries exist." Where an entry is disclosed in response to this inquiry, it will normally be desirable to bespeak a certified copy thereof (fee 1s.).

(*n*) Report, Appendix, para. 18.
(*o*) Report, Appendix, para. 19.
(*p*) Report, Appendix, para. 30.

(ix) "Has any order been made under section 14 of the Water Act, 1945, affecting the property?" (*q*).

These orders, which will normally be of importance to private landowners only in rural areas, may control the abstraction or prevention of waste of water in a defined area. The orders are made by the Minister of Housing and Local Government, and a copy of any order made must be deposited with the local authority.

(x) "Consents and refusals" (*r*).

It is impossible to draft a general inquiry covering all the matters intended by this expression, but a particular question should be asked in each particular case. Many statutes require that land may not be used for particular purposes, or that particular works may not be carried out on land, without the consent of the local authority. If consent is granted, and conditions restrictive of the user of land are imposed, it seems that (under the existing law) those conditions will be registrable as local land charges, but a refusal or an unconditional consent will not be so registrable. Apart from the need to obtain planning permission under the Town and Country Planning Act, 1947, to which special considerations apply (*s*), the type of statutory restriction here contemplated may be exemplified by such sections as section 55 (2) of the Public Health Act, 1936 (prohibiting the obstruction of means of access to a house for the removal of refuse), section 3 of the Public Health (Buildings in Streets) Act, 1888 (prohibiting the erection of a building in front of the front main wall of an adjoining building), or section 33 (5) of the Public Health Act, 1925 (regulating the construction of buildings in front of an improvement line prescribed under the section) (*t*).

Where a purchaser would be concerned to ensure that consent has already been obtained, or would be obtainable, under any such statutory provisions, it is suggested that the position should be ascertained by supplementary inquiry. Incidentally, it is interesting to note that the Committee are recommending (*u*) that mandatory conditions imposed in such consents, and not only those

(*q*) This matter is not referred to in the Committee's Report, but see article above cited, at Vol. 12, p. 54.

(*r*) See Report, para. 32, and Appendix, para. 1 (2) and (3).

(*s*) See the questions as to the "section 14 register" in the standard inquiries now in use.

(*t*) The need to apply for permission to convert residential property for other uses, under Defence Regulation 68CA would also come under this heading.

(*u*) Report, Appendix, para. 1 (A) (1).

drafted as restrictive of the use of the land, should be made registrable as local land charges.

(xi) "What is the rateable value of the property?"

Some solicitors acting for purchasers invariably include this as a supplementary inquiry, but it is submitted that its inclusion is justifiable only where the information is required in order to ascertain the effect of the Rent Acts on the property. In some circumstances, it may also be necessary to ascertain what was the rateable value of the property in 1914; an inquiry whether the property was registered as de-controlled under the Rent Acts of 1933 or 1938, is at present included in the standard inquiries.

(B) Other Inquiries

In so far as local authorities maintain registers or statutory records of information which would be of value to a prospective purchaser, other than such as would be disclosed in response to a local land charge search, it will be observed that we have suggested that the information should be obtained from the local authority rather by way of inquiry than by a personal search in the appropriate register in each case (*v*). It is now, however, proposed to discuss what other inquiries may be made on behalf of a prospective purchaser, of statutory bodies as well as local authorities properly so-called.

(i) *Utility Undertakings*

Each Electricity Board must keep at their principal office a map of their area of supply and showing the line and the depth below the surface of all their existing mains, service lines and other underground works and street boxes, and they must bring this map up to date at least once every year (Electric Lighting (Clauses) Act, 1899, Sched., s. 60, as amended by the Electricity Act, 1947). This map is to be open to inspection of all applicants at all reasonable times (inspection fee 1s.; fee for copy of the map, or part thereof, at the undertakers' discretion, not exceeding 5s.).

Each water undertaking to whom either section 21 of the Waterworks Clauses Act, 1847, or article 12 of the Third Schedule to the Water Act, 1945, applies (this will, in effect, include most

(*v*) Where an entry in the particular register is revealed in reply to the inquiry, an inspection of the entry and possibly further inquiries will often be desirable. The registers required to be maintained by a local planning authority under s. 14 of the 1947 Act, and under the Town and Country Planning (Control of Advertisements) Regulations, are already covered by the "standard inquiries" at present in general use.

undertakings operating under special statutes, but does not include local authorities supplying water under the Public Health Act, 1936), must prepare and keep up to date a map showing all their existing underground works. This map is open to public inspection by any "person interested," at all reasonable hours, free of charge.

There is no similar provision applying to gas boards.

These provisions, where relevant, are but rarely used in practice, whether by conveyancers or by other persons, but it seems that in cases of difficulty, they might well be used more frequently.

(ii) *River Boards*

Under section 7 (7) of the Rivers (Prevention of Pollution) Act, 1951, every river board is required to maintain a register containing such particulars as the Minister may direct of conditions that may have been imposed under that section in relation to outlets for the discharge of trade or sewage effluent to a stream, or in relation to effluent from land or premises in their area, and are for the time being in force. So much of this register as relates to any outlet, or to any land or premises, is to be open to inspection at all reasonable hours by any person "appearing to the river board to be interested," or by any person authorised by him. This somewhat qualified right to inspect the register, which may, apparently, be exercised free of charge, may be most useful to an intending purchaser of industrial premises having an outfall to a "stream," within the meaning of the Act.

(iii) *Development Plans*

Once a development plan under the Town and Country Planning Act, 1947, has become operative for a particular area, and unless the practitioner concerned is already well acquainted with its precise provisions (*w*), it will normally be desirable for an intending purchaser to inspect the plan itself (*x*). It is suggested that the inquiries at present included in the standard form (*y*) do not go far enough in the majority of cases; at least not where

(*w*) This will often happen in rural areas, where the provisions of the plan will not normally be detailed.

(*x*) Copies of the plan are to be made available for inspection by the public, free of charge, by virtue of s. 10 (2) (c) of the 1947 Act, and regs. 22 and 24 of the Town and Country Planning (Development Plans) Regulations, 1948 (S.I., 1948, No. 1767); printed copies are to be available for sale to the public at a reasonable cost. The Committee (Report, para. 21 (1)) clearly contemplate that it will become common practice for a proposing purchaser to "scrutinise" the development plan.

(*y*) See questions 7 (A) on Form 29A, 4 (A) on Form 29B, and 7 (A) on Form 29C.

the purchaser proposes to carry out development on the property, as he is entitled to know whether or not his proposals are such that would be likely to obtain planning permission as not conflicting with the provisions of the development plan.

If the property is near the boundary of a National Park, it may also be desirable to inspect the order designating the park, which will be available for inspection by members of the public at all reasonable times at the offices of each local authority and joint planning board whose area includes any land in the area designated as a park (*z*).

(iv) *Rights of Way*

In certain circumstances, an intending purchaser may be concerned to ensure that the property is not subject to a public right of way. Before a "definitive map" has become effective under Part IV of the National Parks and Access to the Countryside Act, 1949, for the particular area, it may be desirable to inquire of the appropriate county borough or county district council whether the owner of the land has deposited with the authority any map and statement admitting the existence of a public right of way under section 1 (4) of the Rights of Way Act, 1932 (*a*); unfortunately, the absence of any map and statement so deposited is not necessarily conclusive to the effect that there is no right of way over the land affected (*b*). Once a definitive map has become effective under the 1949 Act, the provisions of the 1932 Act will to some extent become obsolete, although it is submitted that an inquiry as to any action taken under the 1932 Act should still be made. Any definitive map, which will be on deposit at the offices of any local authority within whose area the land is situate, should be inspected (*a*) in any case where the existence or otherwise of a public right of way would be of importance.

(*z*) See National Parks and Access to the Countryside Act, 1949, s. 7 (6). It seems that the local authority will be entitled to make a charge for each inspection of 1s., and a further fee of 1s. for every hour the inspection continues beyond the first hour, by virtue of s. 280 of the Local Government Act, 1933.

(*a*) S. 280 of the Local Government Act, 1933, will apply to these cases also.

(*b*) A statutory declaration lodged with the local authority under s. 1 (4) (b) of the Act will, however, in the absence of proof of a contrary intention, be sufficient evidence to negative the intention of the owner or his successors in title to dedicate any additional ways as public highways.

ESTATE DUTY AND THE FAMILY COMPANY

By G. Brian Parker, m.a., ll.b., Barrister-at-Law

It has become increasingly common of recent years for one-man or family businesses to be transferred to private companies incorporated under the Companies Acts. Apart altogether from income tax considerations, such a step has a number of advantages which commends it to, for example, a successful business man with a family to provide for who is approaching the age for retirement and wishes his sons to carry on the business after his retirement or death. Thus the sons can be taken on the board of directors and so prepare themselves to exercise the control of the company's affairs in the future, and the ultimate control of the company through its members can be secured either in advance by gifts to members of the family or ultimately by bequests in the will of the founder, or partly in one way and partly in the other. The founder himself may have faith in the sons' abilities and in the strength of their sense of family duty and so be prepared to divest himself either at once or in the near future of the whole ultimate control of the company through its shareholding (namely, by allotting or transferring all the shares to his family), protecting himself only by a service agreement which provides for a pension after his retirement. On the other hand, he may prefer to retain the majority of the shares in his own name.

The principal danger in cases such as this arises from the fact that commonly the founder of such a business has few resources outside the company and his executors may be faced with the necessity of raising a substantial sum in estate duty when the only assets in their hands are shares in a small private company.

In order to appreciate the gravity of such a situation it is necessary to consider the provisions of a number of Finance Acts which apply to such a case. The principal provisions are those contained in sections 46 to 59 of the Finance Act, 1940. The major part of these replace less comprehensive provisions contained in sections 34 to 38 of the Finance Act, 1930, and they have themselves been amended by subsequent Finance Acts. The present Lord Chancellor in the recent case of *St. Aubyn* v. *Att.-Gen.* [1952] A.C. 15, referred to these provisions as "provisions which are, I think, of unrivalled complexity and difficulty and couched in language so tortuous and obscure that I am tempted to reject

them as meaningless." Like many other provisions in Finance Acts they employ words upon Humpty Dumpty's principle: words mean just what the legislature has chosen them to mean—which may be something quite different from their ordinary meaning.

Transfer to a Controlled Company

Section 46 (1) contains the kernel of these provisions. As amended by the Act of 1946, it is as follows:

> "When a person dying after the commencement of this Act has made to a company to which this section applies a transfer of any property (other than an interest limited to cease on his death or property which he transferred in a fiduciary capacity), and any benefits accruing to the deceased from the company accrued to him in the five years ending with his death, the assets of the company shall be deemed for the purposes of estate duty to be included in the property passing on his death to an extent determined . . . by reference to the proportion that the aggregate amount of the benefits accruing to the deceased from the company bore to the net income of the company."

It is not possible within the scope of this article to delve deeply into the extremely far-reaching nature of this provision as amplified by the subsequent sections and amended by subsequent Acts. For our purposes it will be sufficient to say that a company to which the section applies is one which, at any time between the date of transfer and the date of death was, or would on certain assumptions have been, deemed for the purposes of section 256 of the Income Tax Act, 1952 (formerly Finance Act, 1922, s. 21) to be under the control of not more than five persons. The effect of the "assumption" is to include companies incorporated outside the United Kingdom and transfers made at any date, however remote. The meaning of "control of not more than five persons" is derived from a number of Finance Acts (now consolidated in section 256 of the Income Tax Act, 1952), and is such that a company of the type now being considered is almost certain to be one to which section 46 applies. Thus a person and his nominee, partners, *cestuis que trust* and relatives count respectively as one person only and "relative" means a husband, wife, ancestor, lineal descendant, brother or sister.

Perhaps the effect of section 46 can be best explained by taking a typical case. A is the proprietor of a business. He causes a company to be incorporated and he sells his business to the company for £20,000 in consideration of the allotment to

him or his nominees of 20,000 shares of £1 each. In fact 5,000 shares only are allotted to him, the remaining 15,000 being allotted to his children. It is a term of the sale of the business to the company that A shall be employed as managing director for 10 years at a salary of £2,000 a year. He dies eight years later, still holding the 5,000 shares. During the five years before his death he has received his salary of £2,000 a year but of that only £1,000 a year is considered "reasonable remuneration." During each of the five years a dividend of 10 per cent. is paid on the shares. Accordingly, in each year A's "benefit" is £1,000 (the "excess remuneration") plus £500 dividend on his shares, an aggregate "benefit" of £7,500 in the five years. The "net income" of the company during the five years is £5,000, £6,000, £6,500, £5,500 and £7,000, an aggregate of £30,000. This will include the £1,000 "excess remuneration" in each year. The net assets of the company are valued at £60,000. A's "benefit" derived from the transfer (£7,500 in the five years) are one-quarter of the "net income" of the company (£30,000 in the five years). One quarter of the net assets of the company is £15,000 or less than the £20,000 transferred by A to the company. Had it been more, it would have been limited to the £20,000. Now the £1,000 a year "excess remuneration" is regarded as though it had been distributed by way of dividend and as A held one-quarter of the issued shares he would have thus received a further £250 a year in dividend. Accordingly, the "benefit" received by A in each of the five years which are attributable to his shares are the £500 dividend actually paid plus the £250 dividend notionally paid by reason of the excess remuneration, an aggregate of £3,750 in the five years, or one-eighth of the aggregate "net income" of the company in the period. One-eighth of the net assets of the company is £7,500. Now it must be remembered that the shares themselves actually pass on A's death and estate duty will have to be paid on their value. Duty under section 46 and duty in respect of the shares is not paid twice over. In this example what is deemed by virtue of section 46 to be included in the property passing on A's death is: first, the proportion of the net assets of the company which is not attributable to the shares, namely, £15,000 less £7,500, equals £7,500; secondly, the proportion which is attributable to the shares (£7,500) less the value of the shares. Suppose this were £7,000, then that difference would be £500 and the duty payable under section 46 would be on £7,500 plus £500, equals £8,000. But had the value of the shares exceeded £7,500, duty under section 46 would still be payable on the £7,500 not attributable to the shares.

The above example is a simple one and it must be understood that many other considerations may have to be taken into account.

Valuation of Shares

The valuation of the shares held by the deceased at his death is likely to involve prolonged negotiations with the Estate Duty Office. In the example given the valuation will be on the basis established by the decision of the House of Lords in *C. I. R.* v. *Crossman* [1937] A.C. 26, involving an attempt to estimate what a purchaser in a hypothetical open market would be prepared to pay for the shares, bearing in mind the disadvantages attendant upon such restrictions on transfer of the shares as are to be found in the company's articles of association, and also any advantages conferred by the articles; for example, a right of pre-emption of shares which other members wish, or are obliged, to transfer. In many other cases, however, it will be found that the deceased "controlled" the company at some time during the five years ending with his death, or received dividends or interest on debentures during those five years which would be treated as "benefits" accruing to him if section 46 were applicable and amounted to more than half of the dividends and interest paid during that period, or was beneficially interested in possession at some time during those five years in more than half of the issued and outstanding shares and debentures and no one else at that time "controlled" the company. In that case, section 55 of the Finance Act, 1940, would apply, and the shares would be valued on the basis of the value of the assets of the company. This is likely to involve a higher valuation of the shares.

Providing the Estate Duty

It will be seen from the above that the founder of such a company as is now being considered, who wishes to limit the amount of estate duty payable on his death, will first take steps to make section 55 inapplicable, and secondly, will limit the "benefits" he receives from the company so far as his circumstances allow. He will then endeavour to survive for five years.

This article is concerned, however, not with how to limit the amount of duty payable but with what steps can be taken, either by the founder during his lifetime or by his executors after his death, to find the duty which is payable. In most cases it will be preferable for the steps to be taken during the founder's lifetime, for he is likely to wield considerably more influence than his executors and, if he has already parted with control of the company, it may

be necessary for him to persuade members of his family to concur in the action to be taken.

The founder can, of course, during his lifetime try to save part of his income from the company and take out insurance policies on his life or invest in readily marketable securities, so that on his death his executors will be in a position to pay at least part of the duty. Such a course, however, necessarily conflicts with the limitation of the " benefits " received by the founder from the company. Moreover, matters are often left too late in the life of the founder for any appreciable sum to be saved.

The fundamental facts normally applicable to this type of company are:

(1) It is too small to interest the general investing public;
(2) In any event, the founder wishes to keep the control of the company in his family;
(3) The nominal capital bears no relation to the actual capital assets as a result of the founder's prudent policy of " ploughing back " profits into the business in the past.

It follows that there can be no question of " placing " shares in the company and getting a market quotation, and *ex hypothesi* a liquidation is the last thing that anyone wants (quite apart from the fact that the founder's shareholding may not be large enough to enable his executors to procure the passing of a resolution to wind up).

It may follow from the fact that profits have been ploughed back in the past that the company is in a position to reduce its capital by returning to its members capital in excess of the company's wants. Commonly, however, such a company has only moderate liquid resources, the bulk of its money being locked up in stocks. Further, generally such companies have little or no unissued capital, so that before the capital could be reduced it would be necessary first to increase it and make a bonus issue by capitalising undivided profits. Unfortunately, a bonus issue followed by a reduction of capital or a reduction followed by a bonus issue is struck at by section 31 of the Finance Act, 1951, which provides that a sum so applied is to be deemed to be a " distribution " for profits tax purposes. It may be, however, that the executors will find the company is not caught by this section, and is in a position to reduce its capital and return to its members moneys in excess of its wants, so that they will receive a sum sufficient to pay the duty. This is not likely to be so in most cases.

Even if the company is in a position to do so, the declaration of a very large dividend immediately after the death of the founder is not a satisfactory way out of the difficulty since it will be subject

to tax (and its payment involve a liability to further profits tax), and may well involve other shareholders (as well as the founder's estate) in having to pay surtax at a high rate.

In most cases, it will probably be found that the least unsatisfactory way of raising money to pay the duty is to persuade some institutional investor to take up debentures or redeemable preference shares in the company. This practice is becoming increasingly common and many insurance companies and some other institutions are prepared, if satisfied as to the company's soundness, to invest in such companies as these. Having first found such an institution, the procedure is to capitalise undivided profits of the company, standing to the credit of some reserve or reserves or of the profit and loss account, and apply the sum capitalised in paying up debentures or redeemable preference shares to which the members will become entitled proportionately to their respective shareholdings. Each member nominates the institution as allottee and the debentures or shares credited as fully paid are allotted direct to the institution, which pays the members their respective shares in the agreed price. In this way, either the founder during his lifetime will receive cash which he can invest in readily marketable securities or his executors after his death will receive cash with which to pay the duty.

An issue of debentures is naturally preferable to one of redeemable preference shares, for, though the latter may carry no voting rights as long as the company continues to prosper, so that the control remains in the family, the payment of debenture interest is a deduction before the profit is arrived at upon which profits tax is paid by the company, whereas the payment of a preference dividend is a " distribution " for the purposes of profits tax.

The disadvantage of this scheme is that the application of the capitalised sum in paying up the debentures or shares is probably an " application " of an " amount " for the " benefit " of the members within section 36 (1) (c) of the Finance Act, 1947, and accordingly, if the company is one whose directors have a " controlling interest " in it (which is almost certain to be the case in companies of this kind), the application of the capitalised sum will be deemed to be a " distribution " for profits tax purposes. Even if this were not so (and it is believed there is no authority on the point as yet), as soon as the debentures or shares were redeemed, section 31 of the Finance Act, 1951, would apply and profits tax again be payable, for by subsection (5) references to reduction of capital are to include references to " repayment or return of share capital " and " repayment or redemption of loan capital other than loan capital issued for full consideration paid in cash . . . or redeemable preference shares so issued."

Another consideration to be borne in mind is the question of a "direction" to surtax under the provisions of section 245 of the Income Tax Act, 1952 (formerly Finance Act, 1922, s. 21). The company, of course, may have made reasonable distributions of its profits in the past, but, if they have not and a "direction" has not been made previously only as a result of the policy of discouraging the payment of large dividends, then it is possible the making of the bonus issue would precipitate a "direction." This is a risk, however, which must be run and, having regard to the current steep increase in costs in most businesses, it is to be hoped that the retention of moneys in the business could be justified.

The effect on family businesses of the increasingly harsh provisions of recent Finance Acts has received considerable publicity of late, and it may be that some relaxation will hereafter be made. Until that is done executors of the founders of such companies will have to find ways and means of raising the duty payable on his death, and the members of his family will have to suffer patiently the losses which are necessarily involved in any scheme designed to raise the sum in question and at the same time keep the family business in being. In this article an attempt has been made to point out some of the problems likely to be met and the advantages or disadvantages of some of the courses of action open.

TENANTS FOR LIFE OF UNDIVIDED SHARES

By E. O. Walford, ll.d., Solicitor

In the majority of cases to which the Transitional Provisions of the Law of Property Act, 1925, are applicable, land held at midnight on December 31, 1925, on trust for persons entitled for life in undivided shares became subject to a statutory trust for sale by virtue of one or other of the sub-paragraphs of paragraph 1 of Part IV of the First Schedule to the Law of Property Act, 1925. So frequently do such cases occur that it is apt to be overlooked that there is an exception. That exceptional case arises where paragraph 4 of Part IV of the First Schedule to the Law of Property Act, 1925 (added by the Law of Property (Amendment) Act, 1926 (Schedule)) is applicable. The paragraph provides that—

> " Where immediately before the commencement of this Act there are two or more tenants for life of full age entitled under the same settlement in undivided shares and after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together (and not in undivided shares) their interests shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, and the joint tenants of the survivor of them shall until the said cesser occurs, constitute the tenant for life for the purposes of the Settled Land Act, 1925."

An obvious example of the operation of that clause is where, on December 31, 1925, under an existing settlement, land is held in trust for A and B as tenants in common for life, and subject thereto in trust for C in fee simple.

The language of the section is fairly wide and it might be thought that there would be quite a crop of cases in which it had been held to apply, when the 1925 legislation was undergoing teething operations. The fact is that the paragraph is notable rather for the number of decisions where it has been held to be inapplicable, as the following examples will show:

(1) In the case where A and B are tenants in common for life, and subject thereto the land is to be held on trust for sale, the proceeds being given to C absolutely, it is held that the land is not " limited so as to devolve together ": *Re Higgs and May* [1927] 2 Ch. 247; *Re Robins* [1928] Ch. 721.

(2) The paragraph does not apply if the person who is to take in fee simple beneficially after the death of the tenants for life is one of those tenants for life (as he might well be) although there is *ex hypothesi* not a beneficial joint tenancy as between the tenants in common: *Re Barrat* [1929] 1 Ch. 336.

Thus, if A, B and C were entitled on December 31, 1925, as tenants in common for life and subject thereto A, B or C is entitled in fee simple (as survivor) this paragraph does not apply.

(3) Again, if A, B and C are entitled as tenants in common for life, and subject thereto the land is held as to a half-share for A's children, and as to the other half for C's children the paragraph does not apply: *cf. Re Colyer's Farningham's Estate* [1927] 1 Ch. 677.

Where the limitation was upon trust for A and B as tenants in common for life, and thereafter upon such trusts as B should appoint in favour of the children of the testator and subject thereto in trust for the testator's heir, Tomlin J. said that it had to be determined "whether at the commencement of the Act, and not whether after the cesser of the interests of the tenants for life, the entirety of the land was limited so as to devolve together," and that regard must be had only to the limitations of the settlement irrespective of what the persons taking under these limitations have done with their shares, so that any appointment or settlement of the beneficial interests *after* the settlement but before January 1, 1926, must be disregarded. Moreover, the limitation in default of appointment was not a vested indefeasible limitation and therefore did not attract the paragraph. It was held that paragraph 1 (3) was applicable.

(4) Paragraph 4 does not apply where the income is to be divided, until the cesser of certain annuities, between A and B, the survivor taking the whole of the income, and on cesser of the annuities, the land is to be held upon trust for certain other persons as tenants in common: *Re House* [1929] 2 Ch. 166.

(5) Nor does it apply where land is held in trust for certain persons in fee simple as tenants in common: *Re Myhill* [1928] Ch. 100.

This, nevertheless, leaves paragraph 4 to operate in all cases where before 1926 land had been settled upon trust for A and B as tenants in common for life and subject thereto in trust for a

specified person or persons in fee simple (not being A or B). In those cases, if A and B were living on January 1, 1926, paragraph 4 will apply. It will, however, have been appreciated that if following the death of A or B his share were limited by the settlement in favour of his children in equal shares, paragraph 4 will not apply and a statutory trust or sale will not arise.

It will also be appreciated that a post-1925 settlement purporting to make A and B Settled Land Act tenants *in common* for life will not be effective, and that a statutory trust for sale will arise. Paragraph 4 affords, I believe the sole example of a case in which the existence of a tenancy in common for life does not cause a statutory trust for sale to arise. For that reason it is liable to be overlooked. In all other cases the only persons who can be joint tenants for life within the Settled Land Act, 1925, are persons entitled as joint tenants beneficially, and not as tenants in common.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Restrictive covenant—identification of dominant tenement—death of covenantee—no assent to vesting of benefit in beneficiary.—Several difficult points concerning the acquisition by an assignee of land of the benefit of a restrictive covenant were discussed by Upjohn J. in *Newton Abbot Co-operative Society, Ltd.* v. *Williamson & Treadgold, Ltd.* [1952] 1 All E.R. 279.

The facts of the case were as follows: X owned two premises in fee simple on opposite sides of a road, in one of which (hereinafter called the plaintiff's premises) she carried on an ironmongery business. In 1923 she sold the other premises (hereinafter called the defendant's premises) to P.Q. and R. who covenanted for themselves and persons deriving title under them that they would not carry on on the defendant's premises, any business which would be "in competition with the business of a furnishing ironmonger . . . ", etc. There was no mention whatsoever of the plaintiff's premises in the deed apart from the description of X in the commencement. In 1947 the defendants acquired the defendant's premises in fee simple expressly subject to the covenant. X died in 1944, leaving all her property to L., and her executors assented in writing to the vesting of the plaintiff's premises in L., but no assent was made with regard to the benefit of the restrictive covenant. L. carried on the ironmongery business and in 1948 sold the business to the B. Society, assigning by deed the goodwill of the business and the benefit of the covenant, and by a separate deed of even date granted the society a lease of the plaintiff's premises for 21 years. The society amalgamated with the plaintiffs in 1949 and the defendants then started to break the covenant. The plaintiffs sought an injunction, and as the defendants admitted they were bound by the covenant, the sole issue before Upjohn J. was whether the plaintiffs were entitled to the benefit of the covenant. The learned judge held that the plaintiffs were so entitled, and the four main points in his judgment were as follows:—

(1) As there was nothing in the conveyance of 1923 to identify the land which was to be benefited by the covenant, clearly, the benefit of the covenant was not annexed to the land so as to run with the land without an express assignment. (*Renals* v. *Cowlishaw* (1879) 11 Ch.D. 866, *per* James L.J. at p. 868; *Re Union of London and Smith's Bank, Ltd., Conveyance* [1933] Ch. 611, *per* Romer L.J. at p. 627.)

(2) As the benefit of a covenant may pass by operation of law as well as by express assignment (*Ives* v. *Brown* [1919] 2 Ch. 314),

X's executors held the benefit of the covenant as bare trustees for L. in equity, and L. could assign the benefit in equity. Had the covenant been assigned to L. by the executors, L. could have assigned it at law also. (*Lord Northbourne* v. *Johnston & Son* [1922] 2 Ch. 309, *per* Sargent J. at p. 317.)

(3) X had (there being no evidence to the contrary) taken the covenant for the benefit of the land and not solely for the benefit of the business, because by taking it either the land or the business could be sold to better advantage. Upjohn J. referred to the words of Cozens-Hardy M.R. in *Reid* v. *Bickerstaff* [1909] 2 Ch. at p. 320, where he said, " For example, I sell a piece of land with a covenant that no public house shall be erected thereon. I sell the adjoining lot to a purchaser who is ignorant of the existence of the covenant. I am at full liberty to release the covenant, or to assign the benefit of it to any particular purchaser, or to deal with the rest of my land as I think fit."

(4) The learned judge then said: " . . . I am unable to agree that where a person is suing as an assign of the benefit of the covenant there must necessarily be something in the deed containing the covenant to define the land for the benefit of which the covenant was entered into." He disagreed with the words of Bennett J. at first instance in the *Union of London and Smith's Bank Case* (*supra*) at p. 625, and, after citing earlier authorities, applied the words of Romer L.J. in the same case at p. 631. Applying Romer L.J.'s dictum, as X retained land capable of being benefited by the covenant, and as Upjohn J. thought this was " ascertainable " or " certain " land which had been indicated otherwise than in the conveyance with reasonable certainty, X could assign the benefit of it to anyone she chose.

The learned judge thought that it was of no importance that the covenant had been assigned to the B. Society in the deed of sale of goodwill and not in the lease, but he expressed no opinion as to what the position would be when the lease expired.

The learned judge's decision on these facts seems, with respect, the most fair, but the reasoning in (3) and (4) (*supra*) is somewhat difficult to follow and the subject seems to have been approached from a viewpoint which is new. As counsel suggested in the case, covenants of this kind restrictive of business, have never before been held to run with the land, but the learned judge without hesitation affirmed that they do so run, and referred to *Nicoll* v. *Fenning* (1881) 19 Ch. D. 258. That case, however, concerned a covenant by the landlord in a building lease not to open another public house on the retained land. Apart from the differences between leases and grants of freehold land in this branch of the law, such covenants might well be considered to stand on a special footing as concerning businesses likely to cause a nuisance to adjoining owners and occupiers.

Validity of restrictive covenant.—National Trust v. *Midlands Electricity Board* [1952] 1 All E.R. 298 has received considerable publicity, but it is difficult to see how Vaisey J. could have come to

any other conclusion. The National Trust own a certain part of the Malvern Hills called Midsummer Hill, and in 1936 the Ecclesiastical Commissioners held certain common lands neighbouring it. In that year, the Ecclesiastical Commissioners by deed, after reciting that, for the benefit of Midsummer Hill, and so as to bind their successors in title, they intended to impose certain restrictive covenants on the common lands, covenanted that:—

(1) "no act or thing shall be done . . . which shall injure prejudice affect or destroy the natural aspect or condition of the land," and,

(2) they would not consent to the erection of any building upon the land.

The covenant was registered under the Land Charges Act, 1925, and in 1947 the functions and property of the Ecclesiastical Commissioners became vested in the Church Commissioners. The defendant board then entered on a small part of the common lands and erected an overhead electricity supply line on wooden poles. The plaintiffs alleged that this was a breach of covenant and sought an injunction against the defendant board and the Church Commissioners.

Vaisey J. held first that the poles were not buildings within the second restriction above, though they might well be erections or structures (*Paddington Corporation* v. *Att.-Gen.* [1906] A.C. 1), and even if they were buildings they had not been erected by or with the consent of the Church Commissioners or their predecessors in title.

Speaking of the first restriction above, the learned judge said it was "extremely inapt and ill-considered," and that "it would be difficult to find wider, vaguer and more indeterminate words than those." The omission of any criterion, such as "the opinion of the National Trust" (*cf. Zetland* (*Marquess*) v. *Driver* [1939] Ch. 1), by which the words in the restriction could be brought under some control, was, in his Lordship's opinion, fatal to its validity. Even if the restriction was not wholly unenforceable, his Lordship thought that the poles did not come within it, as both the aspect and the condition of the land would have to be changed by the defendants, and this was not the case. Finally, his Lordship could not see how any restriction so worded could be said to benefit Midsummer Hill.

It should perhaps also be noted that Vaisey J. decided in this case that the person having the benefit of a restrictive covenant is a "party concerned" within the proviso to section 22 (1) of the Electricity (Supply) Act, 1919, and thus is entitled to be heard by the Minister when it is proposed to lay electric lines across the property subject to the covenant.

Preliminary inquiries before contract—warranty.—In *Mahon* v. *Ainscough* [1952] 1 All E.R. 337, though the facts are somewhat different, the Court of Appeal has in effect affirmed *Gilchester Properties* v. *Gomm* [1948] 1 All E.R. 493, and held that a false statement of fact made innocently in reply to preliminary inquiries before

contract does not amount to a warranty, and so does not entitle the purchaser to damages.

In *Mahon* v. *Ainscough* (*supra*) one of the questions on the now almost invariable printed form of Inquiries before Contract was as to whether the property had suffered war damage. The answer made in good faith was: "I understand not." It was noted at the end of the form that it was still necessary to make inspection of the property. The answers to the preliminary inquiries were later confirmed generally by one requisition, and the sale was completed. Later it was found that the premises had sustained substantial war damage, and purchaser sued for damages for breach of warranty.

The Court of Appeal came to their decision with little hesitation. The learned Master of the Rolls referred to Romer L.J.'s remarks in *London County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property and Investment Co.* [1936] 2 All E.R. at p. 1049, where he said: "What is meant by saying that the plaintiffs warranted the truth of the representation? Surely this, that the defendants contracted with the plaintiffs that, in the event of the representation turning out to be untrue, they would indemnify the plaintiffs against any loss which might be thereby occasioned to them." "I confess," said Evershed M.R. in the present case, referring to the Inquiries before Contract, "that anything less like the asking for a warranty or the giving of a warranty than this document would be difficult to imagine."

Therefore the court held that there had been a mere innocent representation of fact and the vendor could not be made liable in damages. (*Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30.)

Power of advancement—"trusts constituted or created" before 1926—*Trustee Act,* 1925, *s.* 32 (3).—In *Re Batty* [1952] 1 All E.R. 425 a special power of appointment was conferred by a will which came into effect before January 1, 1926. The power was exercised by deed in 1951, and the question arose whether the trustees of the trusts arising under the deed of appointment had a statutory power of advancement under section 32 of the Trustee Act, 1925. Section 32 (3) of that Act provides that the "section does not apply to trusts constituted or created before the commencement" of the Act. Vaisey J. held with some hesitation, because the point was not an easy one, that the trusts arising under the power of appointment had been constituted or created by the will and therefore the statutory power did not apply.

The learned judge referred to the similar provision contained in section 31 of the Act, concerning the trustees' power to provide maintenance, and to *Re Dickinson's Settlement* [1939] Ch. 27 in which Crossman J. contrarily held in similar circumstances that the power of maintenance did apply. The relevant words in subsection (5) of section 31 are, however, "the instrument . . . under which the interest arises." Vaisey J. thought in the present case that the authorities gave him very little assistance (except perhaps *Muir* v. *Muir* [1943] A.C. 468, where the word "constituted" was treated as he proposed to

treat it) but he noted that section 32 is a revolutionary provision of confiscatory effect, and thought that the contrary interpretation would not have been intended without very much stronger words from the legislature.

Name and arms clause—" disuse."—In *Re Lewis's Will Trusts* [1951] 2 T.L.R. 1032 (see *Conveyancer's* Notebook, *ante*, p. 5), Vaisey J. decided, inter alia, that the word " disuse " in a name and arms clause was void for uncertainty. The point arose again before him in *Re Bouverie* [1952] 1 All E.R. 408, and the learned judge came to the same decision.

A testator had by his will directed the settlement of certain freeholds with a proviso that if any tenant for life under the will and her husband (in the case of a woman) should fail to assume the name of B., within one year of becoming entitled, or should at any time afterwards " disuse " such surname, then his or her interest should determine. In his judgment the learned judge made the same points as in *Re Lewis's Will Trusts* (*supra*), and referred to *Sifton* v. *Sifton* [1938] 3 All E.R., in which Lord Romer said at p. 445, that in the case of a condition subsequent it must be clear from the beginning precisely and distinctly upon the happening of what events it is that the interest will determine. Vaisey J. said: " I am fully aware that these name and arms clauses have been used in accordance with well-known precedents for a great number of years, but, in my judgment, the cases to which I have alluded have put a very different complexion upon the manner in which these conditions subsequent are approached. I am not and I cannot indeed be, moved by the fact that my decision may affect a large number of cases in which this particular point has not been taken."

The learned judge referred to " disuse " as a slippery word, and said that though he had at one time thought that the word " discontinue " might be validly used in these circumstances as being a mere description of a single act, he was not now at all certain that it might not be open to the same objection.

Gift to devisees conditional on payment of weekly sum in equal shares—joint tenancy or tenancy in common.—In *Re North* [1952] 1 All E.R. 609, a testator who died in 1937 by a home-made will appointed his two sons, X and Y, executors, and gave them two properties " on condition that they agree to pay in equal shares " to the testator's wife " for the remainder of her life 10s. a week." After the testator's death the sons paid the 10s. as specified and then X died in 1951.

Wynn-Parry J. held that X and Y had taken the properties as tenants in common. Had the gift stood alone, it would almost certainly have created a joint tenancy, but as the condition was attached to the gift the question arose as to whether there was any indication of an intention (which would be sufficient, however slight), to create a tenancy in common. (See *Robertson* v. *Fraser* (1871) 6

Ch.App., *per* Lord Hatherley at p. 699.) It was conceded that X and Y were personally liable to pay the weekly sum, and therefore if the interest were a joint tenancy, Y would get the whole interest in the properties while X's estate might be liable to pay half the weekly sum. This factor was sufficient to convince the learned judge that X and Y had taken the properties as tenants in common and he was supported in his decision by *Kew* v. *Rouse* (1685) 1 Vern. 353, where the facts were almost identical. In that case there was a direction to pay the sum in question out of the rents from the property, but Wynn-Parry J. did not think that a ground for distinguishing that case from the present one, as in both cases the devisees were personally liable to perform the obligation.

Trust for sale—discretion of the court to order sale when trustee refuses to concur—Law of Property Act, 1925, *s.* 30.—*Re Hyde's Conveyance* is an unreported case of considerable interest before Danckwerts J. (See *Law Journal,* 1952, at p. 58.) The learned judge refused to direct the execution of a trust for sale under section 30 of the Law of Property Act, 1925, because the reasons underlying the application were unmeritorious.

It will be remembered that the court must, under section 30 of the above Act, direct a sale of property held upon statutory trust for sale where all the trustees fail to concur in the sale, unless there is *mala fides* or it would be inequitable to do so (*e.g.,* the direction to sell would enable the applicant to avoid his contractual obligations). (*Re Buchanan-Wollaston* [1939] 2 All E.R. 302; *Re Mayo* [1943] 2 All E.R. 440.)

In *Re Hyde's Conveyance,* the applicant and respondent were brothers who had each advanced half the purchase money in the purchase of certain property which they held on trust for sale for themselves beneficially as tenants in common. The brothers were at that time the sole subscribers and directors of a company which was subsequently put in possession of the property. The respondent and the applicant then quarrelled. The applicant withdrew from the active management of the company and sought to give the company notice to quit and to sell the property at a public auction. The applicant had numerous other business interests, whereas the respondent's livelihood was derived solely from the company. The applicant had refused the respondent's offers to negotiate, including an offer to buy the applicant's share at full value, and the applicant had withdrawn a petition for winding up, which he himself had presented, the day before it was due to be heard.

Danckwerts J. held that this was not merely a case of hardship, but of spite by the applicant against his brother, and an attempt to use the trust for sale to defeat the purpose for which the land had been acquired. He therefore dismissed the application.

Lost settlement—form of trusts implied.—In *Re Knapp's Settlement* [1952] 1 All E.R. 458, Danckwerts J. was asked to direct

the form in which the trusts of a missing marriage settlement were to be carried out. The settlement had been destroyed owing to enemy action in the last war, and the husband of the marriage had died leaving no copy or memorandum of the settlement, save a brief note to the effect that " it provided for equal division of the capital between the surviving children of the marriage, or their offspring . . . ." The husband was survived by his wife, a married daughter with two children, and a grand-daughter who was the only child of a son who had attained 21, married and been killed in action in the late war.

The learned judge followed *Re Trusts Affecting Scheduled Investments* (1943) 87 S.J. 66, where Uthwatt J. made an order permitting the trustees to act on the footing that the trusts of a missing marriage settlement were in a certain form. Danckwerts J. therefore made an order that the income from the trust funds was to be paid to the widow during her life and subject thereto to the daughter and grand-daughter in equal shares, with a proviso that if the daughter should not survive the widow, then her children should take their mother's share in equal shares. The grand-daughter therefore received a vested interest. The learned judge said that he had at first been attracted to the idea that the settlement contained the ordinary trusts of an English marriage settlement, but there was no evidence of any power of appointment in the missing settlement, and from the terms of the husband's note it seemed that his children's interests were to vest on surviving the survivor of the spouses, and not, as is the usual form, at 21 or marriage.

Estate agent—purchaser introduced not " able "—sale to same purchaser after termination of agency.—In *Jack Windle, Ltd.* v. *Brierley* [1952] 1 All E.R. 398, before Lynskey J. on assize, the plaintiffs who were a firm of estate agents, pursuant to a written contract with the defendant, introduced G. as a purchaser of the defendant's bakery business. A price was agreed upon but negotiations ceased before contract as G. could not raise the money. The defendant then wrote to the plaintiffs to withdraw his agency, and the plaintiffs replied regretting his withdrawal and sending in a bill for expenses. The defendant then offered to finance G. to purchase the business by reducing the price and by leaving a substantial part of it outstanding on the security of a second mortgage and a promissory note. This offer was accepted by G., the purchase completed, and on the same day as completion the defendant paid the plaintiffs' bill. The plaintiffs then claimed their commission.

The learned judge, after pointing out that the case depended on the circumstances, held: (1) that the agency agreement had been revoked by agreement. The plaintiffs had assented to the revocation by asking for their expenses to which they were not entitled under the original agreement until the day of completion of a sale.

(2) There was no fraud. It could not be inferred from the defendant's letter that he was withdrawing the property from the market, merely that he was withdrawing his instructions.

(3) Although the plaintiffs introduced G., he was not an " able " purchaser though he was willing. The operating factor in the sale

of the property was not the introduction by the plaintiffs, but the provision of finance by the defendant.

The plaintiffs' claim therefore failed.

Unqualified person preparing instrument—Solicitors Act, 1932, *s.* 47—*term of* 14 *years determinable by tenant at end of any year—agreement not under seal—Law of Property Act,* 1925, *ss.* 52, 54.—In *Kushner* v. *Law Society* [1952] 1 All E.R. 404, an appeal by way of case stated from quarter sessions was dismissed by the Divisional Court. The appellant had been convicted under the Solicitors Act, 1932, s. 47 (1), of drawing or preparing an instrument relating to real or personal estate, not being qualified as a barrister or solicitor. The document in question was not under seal.

The Lord Chief Justice said: "It seems to me that the section must be construed as meaning that, if a person draws or prepares a document, which if it is to be a valid document, must have a seal on it at the time of execution, he commits an offence, and he commits an offence none the less although the document, when executed, does not have a seal on it. Therefore, the question . . . is whether the document which is drawn or prepared is a document which, for the purpose for which it is intended, would require to be a deed, or whether it can be equally effective if it is under hand only."

His Lordship thought that it was abundantly clear that the document in question purported to vest a term of 14 years in the tenant, even though the tenant had a right to determine at the end of each year by giving one month's notice. He applied the principle in *Hanau* v. *Ehrlich* [1912] A.C. 39, concerning contracts not to be performed within a year of their making within section 4 of the Statute of Frauds, 1677, to the effect that if the contract is for a definite period extending beyond the year, though it may be concluded by notice within a year, the statute applies. A lease for 14 years, to be effective, must be by deed, and therefore the appellant was rightly convicted.

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2. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Charity—ultimate contingent gift over—whether charity "sole" beneficiary.—Re Marjoribanks' Trust Deed [1952] 1 T.L.R. 224; 1 All E.R. 191 (C.A.). The trust deed in this case contained an eventual gift over from a Home for Incurables to other charities if the Home ever closed down. The Court of Appeal held that the gift over was a "remote remainder" and it was fair to say that the Home was the sole beneficiary of the trust, in order that its assets might pass to the Ministry of Health under section 6 (1) of the National Health Service Act, 1946, on July 4, 1948, the appointed day. The court pointed out that the whole object of the legislature would be frustrated

in any other event, since most trust deeds contain some such clause. There was no real expropriation of the interests of any other person or charity. It is interesting to see how this situation resembles the situation where property held subject to a possibility of reverter is compulsorily purchased, and the question of the right of the owner of this possibility to share in the compensation arises. The case of successive charities is somewhat stronger, since no question of perpetuities arises. The term " remote remainder," used in this present case, has no reference to perpetuities or remoteness of limitation but simply to its insubstantiality.

Charity—charitable beneficiary and charitable objects—effect of Health Act, 1946.—*Re Couchman* [1952] 1 T.L.R. 437. In the present case a hospital was taken over by a Hospital Management Committee under the National Health Service Act, s. 60. An orthopaedic clinic was operated in connection with the hospital but served out-patients only. A bequest was made to this clinic. Danckwerts J. held that the clinic did not fall within the definition of a " hospital " within section 79 of the Act. The committee had therefore no direct claim to the bequest. A scheme should be prepared, however, and under this scheme the bequest would be administered by the committee along the lines intended by the testator. It was emphasised that the trusts would be those intended by the testator and not the general purposes of the committee. This case illustrates a possible line between administration and objects which is likely to become material in future cases.

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Merchant seamen's wills—" at sea "—liberal interpretation—validity of informal will and infant's will.—Re Newland [1952] 1 T.L.R. 896; *Re Wilson* [1952] 1 T.L.R. 911. These decisions are important in that there was little modern authority directly in point. The Wills Act, 1837, s. 11, preserves the older rules about privileged service wills in favour of " seamen at sea." The Wills Act, 1918, s. 2, made it clear that a member of the Navy or Marines need not be actually at sea for the privilege to operate, but did not extend this relaxation to merchant seamen. Havers J. held, in the Probate Division, that the words " at sea " in the principal Act should be construed liberally in their favour. Newland made a will while a minor, a week before the end of his leave, while his ship was in dock. Wilson made an oral will three days before rejoining his ship. It is important to note that the latter case concerned a will made in 1946, *i.e.*, after the end of the war, although the former was a 1944 case. There is therefore no need to spell out a war-time emergency

situation. At the same time the testator must be attached to some ship at the time of the will, or regularly employed at sea.

(Theobald 49.)

Will—residuary gift—no reference to property passing.—Re Stevens [1952] 1 T.L.R. 590. The courts lean against intestacy. Where a testatrix used words of bequest in favour of three named persons, but failed to describe the property which they were to have, it was held by Wynn-Parry J. that the will, being otherwise formally valid, operated to pass the testatrix's estate to them (in fact to two survivors, as joint tenants, as there were no words of severance). Much of the report is concerned with the fact that no executor had been appointed in the will. It is difficult to understand why this should be material, and the learned judge held it to be irrelevant, though some importance appeared to have been attached to the appointment of an executor in earlier cases, under the particular circumstances in those cases. *Re Turner* [1949] 2 All E.R. 955 was followed.

(Theobald 171.)

Will—trusts—ousting the jurisdiction of the courts—questions of apportionment.—Re Wynn's Will Trust [1952] 1 T.L.R. 278; 1 All E.R. 341. This important decision strikes at a common practice. It invalidates a clause used by many draftsmen (*e.g.*, in 2 Key and Elphinstone, 14th ed., 643; 3 Prideaux, 23rd ed., 767). Trustees were given power to decide whether any moneys were to be treated as capital or income, as between the beneficiaries, and also to decide any question arising in executing the trusts of the will. The trustees sold certain timber and treated all the proceeds as capital. It was held, following *Re Raven* [1915] 1 Ch. 673, that the beneficiaries were not precluded from resorting to the courts to compel the trustees to follow the law applicable to the apportionment. The clauses were against public policy and should be avoided, as misleading the parties.

(Theobald 331.)

Will—condition—residence clause—certainty.—In *Re Gape's Will Trusts* [1952] 1 All E.R. 827, Roxburgh J. was able to distinguish *Sifton* v. *Sifton* [1938] A.C. 656, and hold that a condition as to "permanent residence" was certain and valid. This case is important as marking a possible reaction against the tendency in recent years to scrutinise conditions in order to find some excuse for ignoring them. The learned judge clearly differs from some of his predecessors and does so consciously and deliberately. The decision accords with orthodox canons of construction and with the paramount object of the law of wills, to execute the wishes of testators.

(Theobald 431.)

Administration of assets—order of application of assets of solvent estate—variation of statutory order.—A. E. Act, 1925, s. 34 (3) and Sched. I, Part II. *Re Meldrum's Will Trusts* [1952] 1 T.L.R. 92; 1 All E.R. 274. This case is valuable as a further ruling on the vexed contradictions of section 34 of the Administration of Estates Act. A testator died in 1948. He left Annie a legacy of £500, his deposits in current account, and the residue of his deposit account after payment of debts and legacies. The general residue of his estate was left on trusts, the bulk of it being left to Harold. The testator owed £19,000. There was £12,000 in the deposit account. Annie wanted the debts discharged out of the general residue, mainly at the expense of Harold. Harold wanted them discharged out of the £12,000 in the deposit account, so far as that would go, thus exonerating residue of the larger part of the debt. Upjohn J. held that the testator had varied the statutory order and that Annie must bear £12,000 of the debts. The testator had marked out the deposit account as the proper source out of which his debts should be paid. It is obviously difficult to reconcile this case completely with other cases, especially *Re Kempthorne* [1930] 1 Ch. 268, but the learned judge indicated that each will must be construed by itself, and hinted that *Re Kempthorne* (*supra*) was probably an incorrect decision. A mere direction to pay debts and legacies does not make all bequests subject to deduction. Upjohn J. also pointed out that one must beware of confusing two quite different problems, *viz.*, how a testator wants his debts met initially, and how he wishes a final adjustment to be made among the beneficiaries.

(Theobald 582)

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4. *PLANNING CASES*

By T. A. Blanco White, of Lincoln's Inn, Barrister-at-Law

Planning control—enforcement notice—formalities.—*Burgess* v. *Jarvis* [1952] 1 All E.R. 592, establishes (subject to anything the House of Lords may have to say, should the case go further) the validity of an important technical objection to enforcement notices under section 23 of the Town and Country Planning Act, 1947. An enforcement notice must specify two periods of time: a period (not less than 28 days) after which the notice is to take effect, and a further period within which the action required by the notice is to be taken. It is not enough merely to specify a single period, however ample, within which the notice is to be acted upon, and a notice which does that is invalid. In the ordinary way, of course, the taking of technical objections to enforcement notices serves only to annoy the local planning authority (which may or may not be a useful thing to do), since in the ordinary way a fresh notice can be served forthwith. But there are time limits upon the enforcement of planning control, and if a fresh notice would be out of time, a technical objection may prove permanently effective.

Administrative law — administrative tribunal — certiorari.—The decision in *R.* v. *Northumberland Compensation Appeal Tribunal,* noted at 15 Conveyancer 121, has now been upheld by the Court of Appeal: [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122. If an administrative tribunal is so foolish as to give reasons for its decision, and thereby to make clear that the decision was wrong, the Queen's Bench Division can bring the record up by certiorari and quash the decision as wrong on its face. Denning L.J. was prepared to go further, and to hold that an error admitted openly in the face of the court was as good a ground for quashing a decision as an error on the face of the record. This case does not, however, affect the principle that protects most administrative decisions: which is, that they are matters of administrative discretion on questions of policy, as to which the court will not interfere. Only occasionally does a Minister base his decision explicitly upon a particular view of the law, and so give the court a chance to intervene. For a Minister openly to admit an error is rarer still.

Compulsory purchase—Central Land Board's powers.—Earl Fitzwilliam's Wentworth Estates v. *Central Land Board,* first noted here at 14 Conveyancer 311, and again at vol. 15, p. 189, has now been taken to the House of Lords: [1952] 1 All E.R. 509. All three instances have taken the same view of the law, although their reasons have varied slightly. The Central Land Board has power to buy land, compulsorily, for the purpose of selling it at a price inclusive of development and thereby recovering the charge. Its reasons for picking a particular parcel of land are not relevant.

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5. *LANDLORD AND TENANT CASES*

By J. MUIR WATT, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—"dwelling-house let together with land other than the site of the dwelling-house"—house the mere adjunct of the land—Acts excluded.—Thompstone v. *Simpson* [1952] 1 All E.R. 431, is very interesting, as being probably the first English decision in which the doctrine of the Scottish courts in *Pender* v. *Reid,* 1948 S.C. 381, has been directly approved and applied. In both cases business premises and a dwelling-house were let together, but constituted two separate entities. The business premises were in each case more important than the dwelling-house, so that the latter could be regarded as the adjunct of the former. Hallett J. in *Thompstone* v. *Simpson,* following *Pender* v. *Reid,* held that this was not a case of "land or premises let together with a dwelling-house" within the meaning of the rule in section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939; but a case of a "dwelling-house let together with land other than the site of the dwelling-house" within the meaning of the exception to the rule. The result was that the Acts did not

apply. The subtle doctrine of *Pender* v. *Reid*, worthy of the metaphysical tradition of Scottish jurisprudence, is now established in England. For some of its difficulties, see Megarry's *The Rent Acts* (6th ed.), p. 74.

A similar decision has been given in *Feyereisel* v. *Parry* [1952] 1 All E.R. 728, where a bungalow was held to be an adjunct to the business of letting camping sites.

(Rent Restrictions Guide, 3rd ed., pp. 8, 12–13 and p. (vi).)

Rent Restrictions Acts—improvements or structural alterations—repairs—permitted increase.—In *Wates* v. *Rowland* [1952] 1 All E.R. 470, the Court of Appeal refused to follow the doctrine in the Irish case of *Rabbitt* v. *Grant* [1940] Ir.R. 323, by which the county court judge had felt himself bound, that no permitted increase in respect of "improvement or structural alteration" could be made in respect of anything which is covered by the term "repairs," even if it is also an improvement. In the present case a rotten floor had constituted a statutory nuisance. The landlord replaced it with a tiled one and at the same time raised the foundation by adding a layer of concrete. He was held to be entitled, under section 2 (1) (a) of the 1920 Act to charge an increase of rent of 8 per cent. of the amount spent on raising the foundation.

(Rent Restrictions Guide, 3rd ed., pp. 52–53, 64–65.)

Rent Restrictions Acts—meaning of rent for purposes of section 12 (7) of 1920 Act—total sum paid to landlord inclusive of rates—tenancy within Acts—premium illegal.—In deciding whether the rent payable under a tenancy is less than two-thirds of the rateable value, it is the total sum of money payable to the landlord as rent, and not merely what remains after he has paid rates, which has to be considered. In *Sidney Trading Co., Ltd.* v. *Finsbury Borough Council* [1952] 1 All E.R. 460, the sum named as rent in the tenancy agreement was less than two-thirds of the rateable value. The tenants, however, agreed to pay the landlords for transmission to the rating authority all existing or future rates. By an agreement between the landlords and the rating authority the former made themselves liable as principals for the rates. It was held that the amount of the rates paid by the tenants must be regarded as part of the rent for the purposes of section 12 (7) of the 1920 Act. Accordingly, the tenancy was not excluded from the Acts. The result was that a premium required by the landlords as a condition of the grant of the tenancy was illegal under section 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, and they were held rightly convicted of an offence against the Act. The decision follows *Property Holding Co., Ltd.* v. *Clark* [1948] 1 K.B. 630 and *Alliance Property Co., Ltd.* v. *Shaffer* [1949] 1 K.B. 367, as regards the meaning of "rent" for the purposes of the Rent Restrictions Acts.

(Rent Restrictions Guide, 3rd ed., p. 5.)

Rent Restrictions Acts—personal occupation by a statutory tenant —animus revertendi—" two-home men."—Dixon v. *Tommis* [1952] 1 All E.R. 725, is chiefly interesting for the warning note sounded by the Master of the Rolls about the extension of the Rent Acts protection to " two-home men." He said that judges ought to look somewhat critically at cases where the protection of the Acts is sought by " two-home men," as one of the main objects of the legislation is to make the best use of the unfortunately limited housing resources. As far as the actual decision went, the Court of Appeal refused to disturb the county court judge's decision, which was in favour of the tenant, but the court obviously viewed it with no great enthusiasm. The tenant was held by the county court judge to have given evidence of an *animus revertendi,* although he did not intend to return for three years, and there was a *corpus possessionis* in the shape of furniture left in the dwelling and occupation by a son and son's wife as licensees.

(Rent Restrictions Guide, 3rd ed., p. 102.)

Rent Restrictions Acts—" sharing "—right to draw water and to boil washing—separate dwelling-house.—The doctrine of " sharing " which was first developed in *Neale* v. *Del Soto* [1945] 1 K.B. 144, has given rise to so much trouble that one is thankful for any decision which limits its application. *Hayward* v. *Marshall; Winchester* v. *Sharpe* [1952] 1 T.L.R. 779, decided that a mere right to draw water from a kitchen at all reasonable times, and once a week to use the gas stove to boil washing, were not instances of " sharing " so as to bring the doctrine into play and prevent lettings from being lettings of separate dwelling-houses. The boundary between arrangements which do not amount to sharing and arrangements which constitute sharing is not capable of exact definition, but no doubt in most cases it will be possible to recognise whether particular facts fall on one or the other side of the line.

(Rent Restrictions Guide, 3rd. ed., pp. 27–29.)

Furnished Houses (Rent Control) Act, 1946, *and Landlord and Tenant (Rent Control) Act,* 1949*—security of tenure—notice to quit given more than three months after tribunal's decision—no jurisdiction to give further security—restricted interpretation of Acts.*—In *R.* v. *St. Helens and Area Rent Tribunal, ex p. Pickavance* [1952] 1 All E.R. 455, the Queen's Bench Divisional Court have underlined the restrictive interpretation of section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, given in *R.* v. *Folkestone and Area Rent Tribunal, ex p. Sharkey* [1952] 1 K.B. 54. The result is considerably to whittle down the practical effect of section 11 (1). In *Sharkey's Case* it was decided that section 11 (1) did not give the tribunal a wholly new power, but only extended the power given by section 5 of the 1946 Act. Section 5 only applies where a notice to quit has been served after a reference and before a decision or within three

months after it. Before section 11 (1) can take effect, the conditions required by section 5 must be shown to be present. In *Pickavance's Case* the landlord served a notice to quit one day after the three months' period of security given by section 5 had expired. It was held that a tribunal had no jurisdiction to grant an extension of security of tenure under section 11 of the 1949 Act. The words in section 11 (1), " when a notice to quit has been served," do not refer to any point of time but to the limits of time specified in section 5 of the 1946 Act. It would seem that a more liberal interpretation of section 11 would have been possible than that which has now been adopted.

(Rent Restrictions Guide, 3rd ed., pp. 98–99.)

Landlord and Tenant Act, 1927, *s.* 18 (1)—*covenant by new tenants to put in repair—effect on landlord's claim against outgoing tenants.*—The short point decided in *Haviland* v. *Long* [1952] 1 All E.R. 463, was that a covenant by incoming tenants to put premises in repair did not go in diminution of damages under section 18 (1) of the Landlord and Tenant Act, 1927, so as to enable the outgoing tenants to argue that the value of the reversion had not been affected by their breach of covenant to repair. The fact that the landlord had an undertaking from the new tenants to do the repairs did not affect the measure of damages. So far as the outgoing tenants were concerned it was *res inter alios acta.*

(Woodfall, 24th ed., p. 724.)

Leasehold Property (Temporary Provisions) Act, 1951—*reasonable rent—scarcity value—market rent.*—When the Leasehold Property (Temporary Provisions) Act, 1951, was being debated in Parliament, the Attorney-General rejected proposals to give the county court judge some more specific guidance in regard to what constitutes a " reasonable rent " for the purposes of Part II. In the end it was left to the county court judge, " sitting as a Cadi under a palm tree," to say what such a rent should be. He was not told whether to include or exclude scarcity value. In *John Kay, Ltd.* v. *Kay and Another* [1952] W.N. 132, the county court judge fixed the reasonable rent for renewal of shop tenancies at figures substantially below the market rents which the landlord could have obtained. He thus excluded some scarcity value, although the rent fixed for renewal was much above the rent previously paid. The Court of Appeal refused to interfere with his decision.

Leasehold Property (Temporary Provisions) Act, 1951—*definition of shop—renewal of tenancy—" wholly or mainly for purposes of retail trade or business."—Barthelemy* v. *Neale* [1952] 1 All E.R. 437, is helpful in regard to the definition of a shop for the purposes of Part II of the Leasehold Property (Temporary Provisions) Act,

1951. In this case most of the articles produced on the premises were sold wholesale. About 10 per cent. were sold by retail, but work on these articles might be done on any part of the premises. The tenant sought to give a " spatial " interpretation to the definition of a shop in section 20 (1), namely, " premises occupied wholly for business purposes and so occupied wholly or mainly for the purposes of a retail trade or business," by arguing that it could not be said of any part of them that it was not occupied for retail trade. It was held, however, that the true test was how much of the business done on the premises was retail business, and that the relative profit made by the different activities carried on was an important, but not conclusive, consideration. The tenant was not, therefore, entitled to renewal of his tenancy under the provisions of the Act for the renewal of shop tenancies.

Leasehold Property (Temporary Provisions) Act, 1951—*renewal of shop tenancy—" occupier " of premises—company carrying on business—tenant managing director—application for new tenancy refused.—Pegler* v. *Craven* [1952] 1 All E.R. 685, shows that there may be disadvantages as well as advantages in running one's business under the protection of limited liability. The tenant of a shop and living accommodation applied under Part II of the Leasehold Property (Temporary Provisions) Act, 1951, for renewal of the tenancy. Unfortunately for his application the business carried on in the shop was conducted by a company of which he was the managing director and chief shareholder. He did not, however, hold quite half the shares. It was held that he was not entitled to a renewal of the tenancy, as the company was the occupier of the premises within the meaning of section 10 (1) of the Act. Jenkins L.J. expressly reserved for further consideration when it arose the case of a tenant who is the beneficial owner of all or substantially all the issued shares of a company who occupied a shop in the circumstances described in the present case.

Agricultural holding—security of tenure—position of sub-tenants at determination of head tenancy—section 24 (1) *of the Agricultural Holdings Act,* 1948.—The case of *Sherwood* (*Baron*) v. *Moody* [1952] 1 All E.R. 389, illustrates in an instructive way the weak position of sub-tenants of agricultural holdings under the present Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I. 1948, No. 190), which ought, for a number of reasons, to be amended. Although section 26 (1) (e) of the Agricultural Holdings Act, 1948, gave the Minister of Agriculture power to make regulations to " secure that a sub-tenant will hold from the landlord on the like terms as he held from the tenant," he has not in fact done so. The result is that there is nothing in the Act or Regulations to disturb the common law doctrine that when a head tenancy is properly determined by a notice to quit, the sub-tenancy also comes to an end. Although in this case the sub-tenant was able to serve a counter-notice on the head tenant, because the latter did not state in the notice to quit which he served

on the sub-tenant the fact that he had been given a similar notice by his own landlord (Regulation 9 (1)), and the sub-tenant won his case before the Agricultural Land Tribunal, this elaborate machinery availed him nothing. He was in no better a position than if Regulation 9 (1) had applied and prevented him from serving a counter-notice at all. The head tenancy came to an end because the County Agricultural Executive Committee had given consent to the landlord's notice to quit (the tenant having served a counter-notice under section 24 (1)) and the tenant did not appeal to the Agricultural Land Tribunal. The success of the sub-tenant before the tribunal was an empty victory in view of the destruction of the superior tenancy.

Another reason for amending this regulation was given by the Court of Appeal in *Budge* v. *Hicks* [1951] 2 All E.R. 245. A further reason is the opportunity they provide for the evasion of the security of tenure provisions of the Act by granting a head tenancy to a nominee of the landlord.

(Jackson's Agricultural Holdings, 10th ed., pp. 434–438.)

Agricultural holdings—contracts made before March 25, 1947—arrangements for resumption of occupation by landlord—twelve months' occupation before creation of tenancy—must be occupation by the particular landlord giving notice to quit.—In *Lawes* v. *Caulcutt* [1952] 1 All E.R. 748, Gorman J. gave the only possible interpretation to section 24 (3) of the Agricultural Holdings Act, 1948, when he decided that in order that a landlord may take advantage of the sub-section he must himself have been in occupation for not less than 12 months immediately before the creation of the tenancy. He cannot add the occupation of a predecessor to his own in order to complete the 12 months' period. Section 24 (3) merely saves existing rights under contracts made in accordance with section 12 (7) (g) of the 1923 Act. Where it applies, the landlord can give notice to quit without running the risk of challenge under section 24 (1), and without paying compensation for disturbance.

(Jackson's Agricultural Holdings, 10th ed., p. 138.)

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6. *REVENUE CASES*

By Desmond Miller, of the Inner Temple, Barrister-at-Law

Note:—Where a case is not reported in any of the general series of law reports it is cited from the Annotated Tax Cases (A.T.C.) or Taxation Reports (T.R.).

(a) Income Tax

Samuel Jones & Co. (Devondale) Ltd. v. *C.I.R.* [1951] T.R. 411 (C.S.).

(1) *Statutory provisions*: Rules 3 (a) and (d) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Money expended on the replacement of a factory chimney held a proper deduction in computing profit for income tax purposes. On the facts the Court of Session, differing from the Special Commissioners, found that the entirety was the factory and the chimney an integral but subsidiary part of that entirety. It followed from an application of Rowlatt J.'s test in *O'Grady* v. *Bullcroft Main Collieries, Ltd.*, 17 T.C. 93, that the expense was incurred upon repairs and not upon renewals.

C.I.R. v. *Fleming & Company (Machinery), Ltd.* [1951] T.R. 415 (C.S.).

(1) *Statutory provisions*: Case I of Schedule D, the Income Tax Act, 1918.

(2) *Point*: The Company carried on business as agents and merchants for the sale of machinery and explosives. During the year in question it held eight agencies, including an agency in explosives for Imperial Chemical Industries; this latter was held at will, but had lasted for nearly fifty years, and at the material time the receipts from this source represented 30 to 45 per cent. of the Company's earnings.

By agreement between the Company, its directors and Imperial Chemical Industries:

(i) the agency was determined upon payment to the Company of the sum of £5,320, as "compensation for loss of the agency,"

(ii) the Company and the directors gave covenants, restricting their trading activities, in consideration of the payment of £590, and,

(iii) the Company assigned its explosive stores and magazine to I.C.I. for the sum of £800.

The question at issue was whether the sum of £5,320 was to be treated as a trading receipt, and this the General Commissioners decided in favour of the taxpayer.

The Court of Session, differing from the Commissioners, held that the sum was in effect compensation for loss of profit, and not for loss of a profit-earning asset, and in consequence must be treated as a receipt of the trade.

Kelsall Parsons & Co., Ltd. v. *C.I.R.*, 21 T.C. 608 applied.

Rankine v. *C.I.R.* [1952] T.R. 1 (C.S.).

(1) *Statutory provisions*: Cases II, III and VI of Schedule D, the Income Tax Act, 1918.

(2) *Point*: An important decision on the question whether moneys earned during the life of a business but not received until after discontinuance can be made the subject of assessment.

The principles applied seem to go beyond those laid down by the House of Lords in *Gospel* v. *Purchase* (*ante*, p. 73).

(3) *Facts and Decision*: The appellant taxpayers were mining engineers carrying on business in partnership, as such, until July 11,

1944, when the firm was wound up, a liquidator being appointed in the following October.

During the subsistence of the partnership assessment had been made under Case II of Schedule D upon the profits computed not on an earnings but on a " cash " basis.

In the years preceding the liquidation the appellants had earned substantial fees in valuing royalties for the purposes of the Coal Act, 1938; there had been considerable delay in the adjustment and payment of these fees, which were in the event finally ascertained and paid to the liquidator after the discontinuance of the partnership business.

In these circumstances the Revenue raised additional assessments on the appellants for the years 1942–43 and 1943–44, and a first assessment for the period from April 6 to July 11, 1944, all on an " earnings " basis.

Held:—(reversing the Commissioners' determination)—

(i) the liability of the firm for the years 1942–43 and 1943–44 had been exhausted by assessment already made under Case II, *supra*, upon the cash basis, and the additional assessments for those years must therefore be discharged.

(ii) the Revenue were entitled to discard the " cash " for the " earnings " basis where no previous assessment had been made, as was the position for the broken period April/July 1944, and a first assessment could therefore properly be made for that period.

Faulconbridge v. *National Employers Mutual General Insurance Association, Ltd.* [1952] T.R. 7 (Ch.D.).

(1) *Statutory provisions*: Case I of Schedule D, the Income Tax Act, 1918; section 31, the Finance Act, 1931.

(2) *Point*: The facts showed (as the Commissioners found) that the business was carried on as a mutual concern.

The importance of the decision lies in the conclusions reached by Upjohn J., upon his review of the authorities, namely that it was not an essential condition of every truly mutual insurance association—

(i) that every policy-holder (member) should be entitled to a share in the assets prior to a winding up, or

(ii) that each policy-holder (member) should be bound to contribute further funds in the event of losses.

Golder v. *Great Boulder Proprietary Gold Mines, Ltd.* [1952] 1 All E.R. 360; [1952] T.R. 25 (Ch.D.).

(1) *Statutory provisions*: Rule 3 (a) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: A payment to secure the withdrawal of a claim in damages for fraud is not a payment of damages, or akin to a payment

of damages. As a consequence the deduction is not necessarily prohibited (by Rule 3 (a), *supra*) and the question remains one for the Commissioners' determination.

(3) *Facts and Decision*: The taxpayer company, which was carrying on the business of company promotion, was sued for damages for fraud in relation to alleged misstatements contained in prospectuses issued by, or for which the Company was responsible. There was also a claim for damages for breach of statutory duty.

The action was settled upon terms that the taxpayer paid £25,000 in return for an undertaking (on the part of the plaintiffs) not to sue or continue to sue. In addition to the amount so paid the taxpayer had to disburse some £2,500 in legal costs.

There was evidence to the effect that the settlement had been made on legal advice and that in reaching it the directors had in mind the heavy costs they would have to pay even if successful.

Held:—(affirming the Commissioners' determination)—

(i) that the charge of fraud (and breach of duty) had never been admitted or proved,

(ii) that as a consequence the sum paid, *viz.*, £25,000, could not be said to be damages, or akin to damages, for fraud,

(iii) that the claim arose out of the taxpayer's trade in company promotion,

(iv) that having regard to the foregoing, there was clearly evidence to support the Commissioners' finding that the £25,000 and the attendant costs were disbursements made wholly and exclusively for the purpose of the trade.

C. I. R. v. *Von Glehn & Co., Ltd.* [1920] 2 K.B. 553 distinguished.

Orchard Wine & Supply Company v. *Loynes* [1952] T.R. 33.

(1) *Statutory provisions*: Case I of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Upon a proper construction of the assignment (in writing) it appeared that the consideration passing to the appellant taxpayer was received as part of a normal trading bargain and therefore was to be treated as a (gross) receipt of the trade.

James Swook & Co., Ltd. v. *Blasdale* [1952] T.R. 45 (Ch.D.).

(1) *Statutory provisions*: Rule 3 (a) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: While the mere circumstance that compensation to retiring directors is paid on a change of shareholding control does not of itself involve the consequence that such compensation can never be a deductible trading expense it is essential that the Company proves affirmatively,

(i) that it considered the questions wholly untrammelled by the terms of the shareholders' bargain, and,

(ii) that the decision to pay was taken solely in the interests of the Company's trade.

(3) *Facts and Decision*: The shareholders in the appellant Company agreed to sell their shares to B. & N., Ltd. The agreement for sale provided, inter alia, (i) that the directors (who were also shareholders) should resign from office, and, (ii) that B. & N. Ltd. should procure the appellant company to pay compensation for loss of office to the retiring directors.

The Agreement for Sale was duly executed and pursuant to its terms compensation amounting to some £31,818 paid to two directors. The Revenue maintained that this amount was not deductible in computing the appellant company's profits, in that it was not wholly and exclusively expended for the purposes of the Company's trade.

The Commissioners on appeal accepted the Revenue's view and confirmed the assessments.

Held:—(affirming the Commissioners' determination) the question was one of fact for the Commissioners, and in the absence of some evidence before them that the Company considered the matter independently and decided to pay the compensation solely to advance its own trading interests, they were entitled to find as they did.

Bank voor Handel en Sheepvaart v. *Slatford* (custodian of enemy property) [1952] 1 All E.R. 314; [1952] T.R. 37 (K.B.D.)

(1) *Statutory provisions*: Miscellaneous Rule 1 of Schedule D, the Income Tax Act, 1918; section 7 (1) the Trading with the Enemy Act, 1939; section 42 and Fourth Schedule, the Finance Act, 1944.

(2) *Point*: It was conceded, after deliberations in which (apparently) the Inland Revenue took part, that section 42 and Part I of the Fourth Schedule to the Finance Act, 1944, did not apply to the custodian's position.

Accordingly, the court held that the custodian, having Crown status, was not liable to income tax.

Higgs v. *Olivier* [1952] T.R. 57 (C.A.).

The judgment of Harman J. was unanimously affirmed by the Court of Appeal, who refused leave to appeal to the House of Lords.

(For report of proceedings in the Chancery Division, see *The Conveyancer*, Vol. 15, No. 5 at p. 366.)

(b) Profits Tax

C. I. R. v. *Bell & Nicholson, Ltd.* [1952] 1 All E.R. 428; [1952] T.R. 29 (Ch.D.).

(1) *Statutory provisions*: Sections 30, 34, 35 and 36, the Finance Act, 1947.

(2) *Point*: A dividend, paid out of what are admittedly capital profits, is nonetheless a distribution within section 36, *supra*, and must

therefore be taken into account in computing non-distribution relief for the chargeable accounting period in question.

Lamson Paragon Supply Co., Ltd. v. *C. I. R.* [1951] 2 T.L.R. 723 followed.

(c) Excess Profits Tax

Star Cinemas (London), Ltd. and Majestic (Derby), Ltd. v. *C. I. R.* [1952] T.R. 49 (C.A.).

(1) *Statutory provisions*: Sections 12 and 16, the Finance (No. 2) Act, 1939; section 35, the Finance Act, 1941; section 33, the Finance Act, 1944.

(2) *Point*: Where the effect of a particular transaction is to avoid or reduce the liability to excess profits tax, it matters not that such avoidance or reduction was not the main purpose or one of the main purposes of the transaction.

(d) Estate Duty

Commissioner of Stamp Duties of New South Wales v. *Way* [1952] A.C. 95; [1952] 1 All E.R. 198; [1951] T.R. 427 (P.C.).

(1) *Statutory provisions*: Section 102 (2) (a), (c), (d), The New South Wales Stamp Duties Act, 1920–1949.

(Comparable English legislation to s. 102 (2) (a) is F. A., 1894, ss. 1, 2 (i) (b) or 2 (i) (d); to s. 102 (2) (c) is Customs and Inland Revenue Act, 1881, s. 38 (2) (c); to s. 102 (2) (d) is *ibid.*, s. 38 (2) (a).)

(2) *Point*: (i) A trust established for charitable purposes which by its terms reserved to the settlor, *during his life,* a power to direct appropriation of the income to or amongst the various purposes specified, at his discretion, did not constitute a trust " taking effect after his (the settlor's) death " within section 102 (2) (a) *supra.* (*Burrell & Kinnaird* v. *Att.-Gen.* [1937] A.C. 286, distinguished.)

(ii) A power of direction over the capital and income of the funds, although it expressly enabled the settlor to require the trustees to purchase property from him (albeit at less than the open market value) was held to be fiduciary in character and therefore not a reservation of interest (or benefit) to the settlor within section 102 (2) (c) or (d) *supra.*

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Jarman on Wills. Eighth edition, three vols. Edited by RAYMOND JENNINGS K.C. and JOHN C. HARPER, Barrister-at-Law. Sweet & Maxwell, Ltd. 1951. 2097 pp. £13 13s.

The lapse of over 20 years made the appearance of a new Jarman urgently necessary. The almost unique authority which the work continues to enjoy, after many vicissitudes of edition, also reinforced this need. The present editors must have required considerable fortitude to undertake this task and they appear to have acquitted themselves very well. A formidable mass of case-law has been assimilated into the text. Fortunately, the legislature has made fewer incursions into this field than most. The two main editors have dealt with most of the work, leaving two chapters to other hands. This seems preferable to the tendency to edit a work in syndicate, as overall consistency is maintained. That the present edition is sound and complete needs no confirmation. The probable lapse of time before another edition must also be borne in mind in any attempt to suggest alterations or improvements. All the authorities have been covered, and inserted in the text in the most appropriate contexts. The law is stated as of July 1, 1950, though a number of footnotes refer to later decisions or reversals on appeal. The main criticism is that of conservatism. It may be inevitable that in a massive work of this kind isolated new points tend to be dismissed to footnotes, in order not to disturb the text unduly. A good deal of dead or dying wood might have been excised, but this would require a certain audacity and acceptance of risk unlikely to be found in an editor of Jarman. Mr. Michael Albery's chapter on the Inheritance (Family Provision) Act of 1938 is first-class, coherent, skilful and readable. He had the advantage of a clean slate and was not trammelled with the problems of fitting his work to an existing text. His deft handling of the paradoxes and whimsies of this curiously drafted statute is most impressive. Mr. G. M. Parbury was confronted with the difficulty that the subject of charitable gifts is not peculiarly one of the law of wills. His solution has been to state concrete objects rather than abstract rules, and range them in lists of charitable and non-charitable objects. In general the treatment is adequate and accurate. The "poor relation" cases, the "employee cases" and State hospital cases are duly canvassed. Two cases might well have been more fully described, especially as to their facts. *Williams' Trustees* v. *I. R. C.* [1947] A.C. 447 might be given a little more space. *Re Strakosch* [1949] Ch. 529 is never explained though the abstract principle is alluded to in no fewer than four places (pp. 234, 236, 237, 246).

The work of the main editors must be subdivided according to volume. In Volume I the position of a joint account is covered (p. 39), mutual wills being rather too briefly dealt with (p. 41), options and powers of selection are explained (pp. 68–69). The state of the law on soldiers' wills follows (Ch. VII, Part I). The revocation of testamentary appointments by marriage is dealt with (Ch. VIII, Part I). On p. 218 the treatment of *Re Hardyman* [1925] 1 Ch. 287 is not very clear. It is first pointed out that Mr. Jarman, in the first edition, stated that a gift to a nephew John who predeceased the testator would not revive in favour of an after-born nephew John. *Re Hardyman* is then referred to, which decided somewhat the contrary in the case of a first wife and a second wife, without any explanation of the distinction. The chapter on perpetuities is well revised. The older cases tend to be stressed at the expense

of the newer, but this may be sound in this particular field. *Re Gaite* [1949] 1 All E.R. 459 might have been more fully exploited, *e.g.*, it is referred to on p. 342 but might usefully have been referred to on p. 305 in considering the question of who are the "lives in being." A cross reference to p. 1071 would be useful in connection with *Re Slater* [1907] 1 Ch. 665, on the problem of ademption of bequests of shares by conversion into nationalised stock (see *infra*). There are good explanations of "commorientes" (pp. 446–7) and of the effect of the Wills Act, 1837, Ch. 33. Invalidity of attempts to delegate testation is discussed (p. 500), and cases of repugnancy, including *Re Alexander* [1948] 2 All E.R. 111.

In Vol. II recent cases on referential gifts are referred to (especially at p. 692), recent cases on *Lawes* v. *Bennett* (at p. 741) and *Re Donkin* and *Re Bradshaw* are briefly referred to (p. 745). The description of *Re Warren* and related cases is fuller (p. 745). Chapter XXIV, on Powers of Appointment, shows signs of revision (*e.g.*, on p. 788, in dealing with the classification of powers). The old arguments on the perpetuity rule and the doctrine of election (p. 850) might perhaps now be omitted as the rule is well settled. The treatment of precatory trusts (p. 877) is rather old-fashioned, though some recent cases suggest that the problem is not yet solved. The section on Secret Trusts (pp. 907 *et seq.*) has been completely rewritten in the light of the recent cases. The meaning of "money" is dealt with in several connections (pp. 1009, 1284). The important case of *Re Gillett* [1950] Ch. 102 is included (p. 1022). All the new cases are dealt with in connection with the liability of personalty for legacies (p. 1036), legacies of shares in private companies (pp. 1052, 1055) and legacies to employees (p. 1100). In connection with the substitution of new stock there is a footnote reference to the stock of the new nationalised undertakings (p. 1071) but this subject might well merit fuller statement. The effect of coal nationalisation is also important in this connection (see *Re Galway* [1950] Ch. 1). Recent cases on annuities and corpus (pp. 1126–1128), ademption of legacies by portions (pp. 1141, 1143–44) and the valuation of property for hotchpot (p. 1162) are incorporated. There are also the cases on the rule in *Lassence* v. *Tierney* (pp. 1167 *et seq.*) and on apportionments (pp. 1194, 1198). Capitalisation of company profits is dealt with (p. 1201), terminable payments (p. 1209), express powers to postpone conversion (p. 1213) and gifts to "widows" (pp. 1269–70).

Recent developments in gifts of stocks and shares are referred to (p. 1291), and the meaning of various gifts of household goods and effects (pp. 1293 *et seq.*). There is a new text on legacies of a "business" (pp. 1298 *et seq.*). Chapter XL, on executory devises, is retained. There may still be some difference between executory trusts and equitable remainders and this retention may be justified, though there might well be an explanation of the reasons, possibly on p. 1431. The modern case of *Re Pratt* is included (p. 1425 "x"). There is considerable rewriting in Chapter XLI, on the validity of conditions in bequests (especially at pp. 1453, 1469). Forfeiture clauses and the condition of enemy aliens are discussed (p. 1506), the abolition of the restraint on anticipation (p. 1507), and conditions as to residence and outgoings, in the light of the Settled Land Act, 1925 (p. 1538).

In Volume III the question of the interpretation of a gift to "relations" in a modern will is included (p. 1622), and a full account of *Elliott* v. *Joicey* [1935] A.C. 209 is given (p. 1698). Chapter XLVIII, on revenue matters, has been completely rewritten (pp. 1806–1824). The old law of limitation of an entail by will is becoming obsolete but it is probably too early to dispense with it and it has been retained (pp. 1825–1836). Chapter LI (pp. 1866–1889) on the charge of debts on real estate might possibly now be omitted. As is pointed out in a footnote (p. 1867, "h") the executor's right of retainer is now extended to real estate. On p. 1957 ("q") it is pointed out that marshalling is now conducted on different principles. Page 1896, para. 4, and p. 1899 show the wording of the new provisions on the application of assets

charged with the payment of debts in a solvent estate. On the question of limitation, section 18 (1) of the Limitation Act, 1939 might be now considered. This subject is important also in connection with the primary liability of personalty referred to on pp. 1036, 1904. A general discussion on all these points might usefully be added at the beginning of Chapter LI in any later Supplement, as the editors are obviously aware of the problem. The very recent decision in *Re Fitzpatrick* is relevant on the point stated to be dubious on p. 1892 ("o"), the liability for the cost of getting in a specific legacy. Pages 1898–1899 deal with the important cases on the liability of lapsed shares for debts and legacies. Pages 1914–1938, on exemption of personalty from primary liability for debts, is important in view of the cases on the new law referred to on p. 1904, and this is pointed out in a footnote.

On pp. 1946–1952 the thorny problem of the valuation and payment of annuities out of a deficient estate is considered. Though there are no actual inaccuracies the presentation is less clear than in other works. The account given in *Theobald on Wills* (10th edition) by Dr. J. H. C. Morris appears to be much clearer. Dr. Morris points out that where an estate is insufficient to meet all annuities etc. in full, the annuities must be valued. If an annuitant dies after the testator, but before the decision of the executors that the estate is deficient, his estate is only entitled to the arrears of the annuity to date and not to the actuarial value of an annuity based on his normal expectation of life (p. 359). The present edition of Jarman states the rule on p. 1949 "b" but without explaining what actually happens. It goes on to cases where a past valuation is used, states that supervening circumstances can be taken into account, but seems to contradict this by stating that the estate of a dead annuitant takes the actuarial value as if he were not dead. The subject is admittedly not easy to explain but could be made clearer than it is. A passage on p. 1951 (iii) is also in apparent conflict with the other portions of the text just referred to. The "values" here referred to are the arrears since the testator's death and not a capitalised value.

The modern cases on the rule in *Jones* v. *Westcomb* are covered (p. 2059).

The very full Tables of Cases, and the extensive Index must be referred to. Jarman is a repertory of Case-Law on a subject which abounds in fine distinctions. The main criticism of the present edition is that recent cases are often dealt with less fully than older cases have been in the past. Yet it is to the recent cases that the draftsman of a will must turn, since the trend of judicial decisions markedly varies from age to age. Here the fault has been an excessive respect for the work of former times and a diffidence which the obvious ability of the editor shows to be groundless. With this observation, and the few minor criticisms voiced above, the new Jarman can be strongly recommended as a very complete and careful work, which should continue to enjoy the high authority of its predecessors.

A. K. R. K.

Solicitors and Local Authorities. By A. V. Risdon, Solicitor, and J. R. Farrant, B.A., Solicitor. London: Butterworth & Co. (Publishers), Ltd. 322 pp. and Index, Tables of Statutes and Cases. (47s. 6d.)

The authors rightly claim in their preface that this book is unusual: it is unusual both in its scope and its method of presentation. The conveyancer today has to deal with numerous matters quite outside the sphere covered by the ordinary books on conveyancing. There are questions of requisition, expropriation, planning permissions, building licences, loans by local authorities and so on, subjects that in many offices may not arise daily but do crop up occasionally. This book approaches such questions from the point of view of a practitioner who wants to know what to do when they arise. For example, his practice may not necessitate detailed investigation into planning

law, but he is almost certain from time to time to be asked whether planning permission is needed and a development charge payable for some particular change of use or structural alteration. He will be able to answer the bulk of such inquiries from the short section on the effect of planning control and development charge on pp. 25 to 27 and the Use Classes Order and Development Charge Exemption Regulations which are set out in an appendix. Again, he will find some helpful suggestions and useful guidance on the question of compulsory purchase. The section on the local land charges register contains an alphabetical list of the different entries and notes on them. A great amount of hard work must have gone into the preparation of the book and the authors are to be congratulated on the careful selection of matters for treatment.

We imagine, however, that few will be enamoured of the authors' approach to their subject. The greater part of the book is taken up with drafts of letters, but there does not seem to be any apparent advantage in this method over a summary of the legal position with the authors' comments. For instance, letter no. 7 (p. 5) deals with the water requirements of an industrial company; it summarises the law on the rights of riparian owners to abstract water and apparently makes the curious suggestion that the company might erect its works and be satisfied with the abstraction of water for a sufficient time to enable it to procure a right by prescription. Letter no. 264 (p. 314), a solicitor's letter to his client in justification of the Town and Country Planning Act, seems hardly calculated to impress the client with the solicitor's ability. We may have to explain law that is distasteful to our clients, but we are under no obligation to support the political arguments in favour of it; we do not yet have to adopt "the party line." So long as letters say clearly what we want to say, let us, at any rate, write in our own style or lack of it. At times the authors' style, couched as it often is in officialese, is irritating. Is the sentence, "an experienced realistic approach is required from all concerned" (p. 1) anything but meaningless? "A certain age," meaning, apparently, the age of puberty, is an unnecessarily coy euphemism.

The method of exposition and the style should not blind us to the fact that there are a lot of detailed law and many practical suggestions which cannot, at any rate conveniently, be found elsewhere; and the authors have not forgotten that they are writing for the general practitioner rather than the specialist. By today's standards the price is not merely reasonable but very moderate.

E. F. G.

We have also received:—

Notes on Chancery Practice. Second Edition. By F. G. R. Jordan, Solicitor. Oyez Practice Notes. London: The Solicitors' Law Stationery Society, Ltd. 98 pp. (7s. 6d.) The increase in price from 6s. to 7s. 6d. makes this rather expensive. A short new chapter on the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951, has been added.

Development Plans. Planning Enforcement Procedure. By R. N. D. Hamilton, Solicitor. Oyez Practice Notes. London: The Solicitors' Law Stationery Society, Ltd. 20 pp. and 19 pp. (2s. 6d. each.)

Index to the Income Tax Act, 1952. By A. C. Monahan, B.A. London: The Solicitors' Law Stationery Society, Ltd. 160 pp. (15s.) This index, which appears to be very full, contains references not merely to the sections of the Act but also to the pages in the Queen's Printer's copy. There are tables of comparative sections which will be very necessary to practitioners using existing textbooks on income tax.